

**A Critical Examination of the World
Heritage Nomination, Listing and
Management Procedures in Australia**

BY

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DEDICATION

I dedicate this thesis in memory of my father,
the late John S. Barnett
(18 February 1927 to 25 May 1985)

DECLARATION

This thesis is the result of my original research and all borrowed authorities and sources have been duly acknowledged.

.....

AUTHORITY OF ACCESS

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ABSTRACT

This thesis demonstrates that the nomination and listing procedures and subsequent management of World Heritage areas in Australia are grossly inadequate and in need of reform.

The thesis intends to establish the ambiguity of the provisions of the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (hereinafter referred to as the 'Convention') and the inconsistency that exists between it, the operational guidelines and Australian domestic legislation. It argues that the implementation of the Convention into Australian domestic law has caused a limitation of the rights traditionally attributed to the states in Australia's federal system of government. The consequences of the Federal Government ratifying more than 2000 international treaties without a rigorous review process is considered. It demonstrates that the resulting disintegration of the sovereignty of the States vis-à-vis that of the Commonwealth is a major factor that has caused political disharmony. It concludes that the traditionally held rights to manage land use and protect the environment traditionally held by the States and Territories have been dissipated by the Commonwealth Government's use of its powers pursuant to section 51(xxix) of the Constitution, and in particular, the increasing number of international treaties and conventions. In addition, it demonstrates that the Australian Commonwealth Government has not fulfilled its responsibilities as provided in specific articles of the Convention.

The thesis explores the substantially inadequate provision made within Australia's legal and administrative framework for certain, coherent and transparent World Heritage nomination, listing and management procedures. The framework is inadequate to balance equitably the competing interests in World Heritage areas.

The critical examination of the World Heritage nomination, listing and management procedures takes place in the context of a country with a little more than 200 years of development since white settlement, and a country rich in natural beauty and resources. It explains that during the prosperous 1970s there was an upsurge of public interest in the conservation and preservation of Australia's natural

environment. The conservation and preservation of certain parts of Australia's natural environment had a significant detrimental economic impact and caused considerable social and community disharmony. It shows that World Heritage listing subsequently became perceived as a divisive act undertaken primarily for political purposes.

This thesis attempts to demonstrate that the nomination, listing and management of World Heritage areas in Australia should be viewed in a political context and not a purely legal and administrative context. It contends that the inadequacy of the legal and administrative framework, together with the changing constitutional ramifications enhanced the political nature of decisions by the Commonwealth Government relating to World Heritage. It argues that the law has served a primarily political function.

The thesis is designed to show the substantial misunderstanding of "heritage" in Australia. It shows that the misconception of the national estate was and is perpetuated to the detriment of a fair and correct understanding of World Heritage. It demonstrates that this misconception has been cultivated to enhance the green lobby's own political agenda.

A review of the Tasmanian political and electoral system is included. This review explores the inextricable link between the political and electoral system and the nomination, listing and management of World Heritage areas. In this context, the history and background of the green lobby's growing influence over the implementation of World Heritage nomination listing and management is discussed. It shows that most World Heritage areas are owned by State Governments but some areas are privately owned. Those with an 'interest' in these areas are the State Governments, private individuals or companies, and yet the management of these areas remain, primarily, subject to the directions of an oft perceived far-removed Commonwealth Government. The studies explain how the processes for nomination, listing and management have resulted in antagonism between the Commonwealth and the States (generally those governed by an opposing political party), in addition to antagonism between the Commonwealth and the various

competing interests, particularly the forestry and mining industries and the recreational land users.

World Heritage is something in which all Australians should be proud. But because the process for nomination, listing and management is so inadequate, it is open to abuse for political purposes. It is hoped that, through the reform of, both, firstly, Australia's treaty making and ratification procedures and, secondly, the legislative and administrative process for nomination, listing and management, we can substitute a divisive concept for one of which we, as Australians, can be deservedly proud.

Chapter One

INTRODUCTION

The thesis, set out in nine chapters, demonstrates that the nomination and listing procedures and subsequent management of World Heritage areas in Australia are grossly inadequate and in need of major reform.

Consideration of the World Heritage Convention itself is set out in Chapter two. It highlights the inadequacies of the Convention's provisions, particularly with respect to their ability to accommodate the difficulties arising under a federal system of government. It provides an overview of the intent of those provisions, demonstrating the broad definitions given to many of them. The inconsistency and, at times, conflict between the Convention and Australian domestic legislation is also considered. The chapter commences with a short history of how the Convention came into being, and concludes with an analysis that demonstrates it is now the most highly recognised and popularly adopted agreement on conservation in the world, with more countries being signatories to it than to any other in the world.

Chapter three sets the scene for the implementation of the World Heritage Convention in Australia. It describes the impact the National Estate has had on this implementation process. The workings of the Australian Heritage Commission are considered and serious questions are posed as to whether the national estate is becoming a new system of national parks. Some suggestions for legislative reform conclude this chapter.

The fourth chapter explains the constitutional framework within which the World Heritage Convention is implemented in Australia. An analysis of the federal/state balance is followed by an overview of the section 51 powers of the Constitution. It is submitted that the Commonwealth Government has more than adequate powers with respect to the nominating, listing and management of World Heritage areas, but the scope of this power is in question. The role of the states with respect to the

implementation of the World Heritage Convention in Australia is reviewed. Special attention is given to section 51 (xxix) – the external affairs power, and comment is made on the references in various High Court cases, including the Franklin Dam case. A review is undertaken of other relevant Commonwealth powers, such as section 96, section 81 and section 122.

Chapter five provides an overview of the legal framework within which the World Heritage Convention is implemented in Australia. Specifically, consideration is given to the World Heritage Properties Conservation Act 1983 and the 1988 amendments to that Act. Relevant sections of the 1983 Act are reviewed together with specific quotes from Hansard during the debate on this legislation before it passed both Houses of Federal Parliament. The 1983 legislation was the first legislative act of the new Hawke Labor Government, and was passed for purely political purposes – to block the damming of the Franklin River in Tasmania. Special reference is made to the inadequate compensation provisions of both the 1983 and 1988 amending legislation.

Chapter six considers the administrative framework for listing world heritage properties in Australia. Comment with respect to law and policy in Australia and the internal workings of world heritage listing is followed by a review of the Federal/State administrative arrangements. Extracts from the meetings of the Council of Nature Conservation Ministers (CONCOM), and the recently established Australia New Zealand Environment and Conservation Council ('ANZECC'), are reviewed and analysed. The role, function and responsibility of these organisations is also considered.

An overview is given of the world heritage concerns in Tasmania in Chapter seven. This includes an analysis of the Tasmanian Hare–Clark electoral system and how a third party, the Green party, came to be represented in state parliament. This is followed by a consideration of the Green philosophy and tactics – the motivating force behind the Tasmanian Parliamentary Greens. The early development of the Greens as a political force in Tasmania, ie: the establishment of the United Tasmania Group and The Wilderness Society, includes a review of the first World Heritage nomination and the Franklin dam dispute which ended in the High Court of Australia. This is followed by an analysis of the Tasmanian Parliamentary

Accord, commonly referred to as the Green/Labor Accord, which continued for 15 months from May 1989 to the 1st of October 1990. The Accord document included many provisions which had an impact on the World Heritage and its nomination, listing and management in Tasmania. Specific reference is made to the World Heritage Area Appropriate Boundaries Report prepared by the State Department of Parks, Wildlife and Heritage. This chapter reviews the economic and social effect of the Green lobby's expanded reserves and examines the 1984 demands by the Tasmanian Wilderness Society for an enlarged Western Tasmania National Park. It also analyses other Wilderness Society claims made with respect to management procedures in Tasmania's World Heritage areas. The cost of these claims is separately considered in the penultimate section of this chapter.

Chapter eight considers the management of World Heritage in Tasmania and a specific case study – the Bender's Quarry dispute. The chapter includes a history and background to the Bender's Quarry dispute, a review of the closure of Bender's Quarry and the economic implications of that closure. This is followed by a summary of the controversial legal issues emanating from such a dispute. Special reference is given to the Cook/Groom Agreement of November 1988 and its impact on Commonwealth/State relations. The second controversial legal issue considered is the potential breach of section 51 (xxxix) of the Constitution arising from the compulsory acquisition of the Bender's mining lease. The third issue considered is whether Mr Bender, as proprietor of the mining lease, was denied natural justice by the unilateral closure of the quarry by the Commonwealth Minister on 20 August 1992.

The thesis concludes, in chapter nine, by demonstrating that the nomination, listing and management of World Heritage areas in Australia should also be viewed in a political context and not a purely legal and administrative one. It states that the inadequacy of the legal and administrative framework, together with the changing Constitutional ramifications of the ratification of the vast number of international treaties, enhances the political nature of decisions with respect to World Heritage by the Commonwealth Government. It shows that the law has primarily been used to serve a political function.

Chapter 2

THE WORLD HERITAGE CONVENTION AND ITS LISTING PROCEDURES

INTRODUCTION

The concept of 'World Heritage' is a recent phenomenon, gaining acceptance by the international community only in the last two decades. World Heritage represents a commitment to the idea that particular features of the world's natural and cultural environs are of such outstanding global significance that their preservation and protection for posterity is a matter for international concern.

This commitment became a visible instrument in the form of the Convention Concerning the Protection of the World Cultural and Natural Heritage, commonly referred to as the World Heritage Convention. It is now the world's most ratified agreement on conservation.¹ This chapter provides a review of the Convention and its listing procedures.

The Preamble to the Convention, which provides some of the background and rationale for its adoption by the international community, is considered, followed by a review of the Convention's various articles. Some preliminary comments are also made about UNESCO. The Convention is intended to be complementary to the various conservation measures of the signatories to it. But this good intention has been obfuscated in Australia's case. The Convention has been used to transform what many would consider was the traditional domestic legislative framework.² It has been used for political purposes and has been used as a tool in the struggle between the federal and state governments in Australia for the balance of power. The Convention is focused on the protection of any item of cultural and natural heritage of the world. Considerations relating to the economic and social well-

¹ There were 136 countries party to this World Heritage Convention as at September 1993.

² Kiss, A, and Shelton, D, "International Environmental Law" Graham and Trotman (1991) at page 98 "Environmental activities often invade traditional squares of government activity"

being of the people of the world are not specifically incorporated into the Preamble to the Convention, although scant reference is made in the Convention itself to these issues.

Consideration is given in this chapter to the consequences, in economic and social terms, of protection of the cultural and natural heritage. The nomination and listing procedures and the management of the heritage all influence, to a degree, on the economic and social conditions of a community. It is submitted that the protection of the heritage cannot and should not be viewed in isolation from those conditions.

The review of articles 1 and 2 of the Convention demonstrates the inconsistency and confusion that may arise from reading them. The terms used in articles 1 and 2 are broadly defined – lacking a precise meaning. The remainder of the articles in the Convention are considered in an analytical and critical manner and, in many instances, they are compared with the operational guidelines which have been established by the World Heritage Committee and which are irregularly updated.

Special attention is given to articles 4 and 5 of the Convention which set out the responsibility to identify, protect and conserve items of outstanding universal value. Reference is made to comments from various Justices in the Franklin Dam case,³ particularly as they relate to Australia's obligation to respond or act pursuant to the Convention. This section of the chapter considers to what extent the obligation set down in the Convention influences the decisions taken by both the Federal and State Governments of Australia.

Article 6 of the Convention provides for the protection of property rights and provides that no deliberate measures be taken which might damage, directly or indirectly, the heritage. It is demonstrated that this article takes no account of the economic, social or other circumstances prevailing at the time or flowing from the decision.

Article 7 of the Convention reviews the international co-operation and assistance, and articles 8, 9, and 10 comment on the establishment and workings of the World Heritage Committee. The nomination procedure is considered in articles 11 and 12.

³ *Tasmania v Commonwealth* (1983) 46 ALR 625.

Australia has, to date, still not prepared and completed in full the inventory as required pursuant to article 11(1). Despite this fact, the World Heritage Committee continues to invite and accept properties nominated by Australia as a State Party. In consideration of the nomination procedure, reference is made to both the nomination form used by Australia, as well as the Operational Guidelines. One of the outcomes provided in this article is that the Convention prevails over both the guidelines and the form, and the guidelines prevail over the form.

In regard to articles 13 to 29 of the Convention, an overview is provided. Specific analysis is included of article 34(a) and (b). This relates to the Federal or non-unitary constitutional system and the relationship of the Convention to the constitutional arrangements in Australia. It is noted that the article makes no provision for the relevant state to accept the recommendation of the federal government. The history of controversy and conflict in Australia between federal and state governments demonstrates the difficulty in drafting a 'full-proof' convention and it could be argued a lack of foresight in drafting this particular provision of the Convention.

It is also noted that the Convention provides no opportunities for State parties to delist any area or property it may have nominated and which has been accepted. It is interesting that the Operational Guidelines as revised in 1994 do include a reference to delisting, but it is noted delisting can only occur with the support and endorsement of the World Heritage Committee. This review is set out in the penultimate section of this chapter, under the heading 'What is not in the Convention'.

The final section of this chapter is the conclusion.

UNESCO

The United Nations Educational, Scientific and Cultural Organisation ('UNECOSO') adopted at its General Conference, 17th Session in Paris on 15 November 1972 ⁴

⁴ By a vote of 75 to 1 with 17 abstentions. The meeting was held in Paris from 17 October to 21 November 1972.

the Convention Concerning the Protection of the World Cultural and Natural Heritage, commonly referred to as the World Heritage Convention. The Convention soon became widely accepted in the international community. 'Already it is not only UNESCO's most broadly accepted international instrument, but also the world's most ratified agreement on conservation.'⁵ The idea of a convention to protect and preserve the outstanding items of World Heritage was first proposed in the United States at a conference convened by the United States Government administration in 1965.

*The idea for such a treaty grew out of a proposal for a World Heritage Trust which was first proposed at a White House Conference on International Co-operation in the United States in 1965. The Conference recommended a trust for the World Heritage which would be responsible to the world community for the stimulation of international co-operation to identify, establish and manage the world's important and natural sites for the world's citizens. The United States proposed the idea to UNESCO.*⁶

In order to provide a history and background to this Convention, it is helpful to consider its author, UNESCO.⁷ The Convention itself has created immense political, legal and social controversy, and it is perhaps not surprising that UNESCO, has been, also, shrouded in controversy since its inception.⁸ A brief review of UNESCO follows.

⁵ The World Heritage Convention – an idea in action, UNESCO, October 1988, page 2.

⁶ Dr Keith D. Suter, Foundation Director, Trinity Peace Research Institute, the UNESCO World Heritage Convention, Environmental and Planning Law Journal, March 1991, pages 8 and 9.

⁷ See Starke, J. "The UNESCO International Law Making Process", Australian Law Journal (1989) Vol. 63, page 850.

⁸ No member nation has ever resigned from the UN itself, and very few have ever resigned permanently from its specialised agencies. However in a letter, dated 28 December 1983, the United States Secretary of State, George Schultz, sent to the Director-General of UNESCO, notice was given of the withdrawal of the United States from the organisation with effect from 31 December 1984.

"According to a United States' State Department spokesperson,

'UNESCO has extraneously politicised virtually every subject it deals with, has exhibited hostility towards the basic institutions of a free society, a free market and a free press, and has demonstrated unrestrained budgetary expansion'.

The British Government indicated in November 1984 that the United Kingdom would withdraw from UNESCO by the end of 1985 if certain changes had not by then taken place within the organisation." *ibid.*, page 6.

The United States and the United Kingdom remain outside UNESCO, but nevertheless remain a party to the World Heritage Convention (the United Kingdom ratified the Convention in 1984, just before announcing its intention to withdraw from UNESCO in 1985).

UNESCO is an arm, or specialised agency, of the United Nations.⁹ UNESCO was established with 20 member-nations in 1946.¹⁰ Australia was one of the first twenty signatories.

Despite UNESCO's somewhat turbulent history, Murphy J in the Franklin Dam case had this to say about the role and merits of international organisations such as UNESCO:

*Through bodies such as UNESCO, under whose auspices the Convention was created, the UN has attempted to educate the people of the world to think of themselves as one, to break down the intense nationalistic attitudes which lead to war. The encouragement of people to think internationally, to regard the culture of their own country as part of world culture, to conceive a physical, spiritual and intellectual world heritage is important in the endeavour to avoid the destruction of humanity.*¹¹

The framers of the Convention, like UNESCO itself, were not averse to dealing with politically sensitive issues and this proclivity has been reflected, certainly in Australia which 'has probably had more litigation and political challenges to the Convention than all the other States party to the Convention combined'.¹²

THE PREAMBLE TO THE CONVENTION

The preamble to the Convention provides some of the background and rationale of the Convention.¹³ It reads as follows:

...considering that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an effective complement thereto.

⁹ The UN's forerunner was the League of Nations (1919 – 1946).

¹⁰ "UNESCO is one of the largest United Nations specialised agencies. It differs from other UN agencies in that its activities relate to several broad issues – education, natural science, social science, culture, and communication" *ibid.*, page 4.

¹¹ *Tasmania v Commonwealth* 46 ALR 625 at 733, 734.

¹² Dr Keith D. Suter, *The UNESCO World Heritage Convention*, *Environment and Planning Law Journal*, March 1991, page 4.

¹³ See also UNESCO "What is the World Heritage Convention?" February, 1988. UNESCO, Paris.

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

It is evident from reading articles 1 and 2 that the Convention is concerned with immoveable sites rather than moveable objects.

The eventual treaty is noted for its extremely broad scope – it is the first time that a major treaty has dealt simultaneously with both types of sites (natural and human made sites – which have traditionally been kept separate.) ¹⁷

However, article 2 provides evidence for the argument that the definitions are in fact ambiguous and dynamic in that they deal with changing criteria – changing not simply on a year to year basis, but on a day to day basis. The second part of the article defines natural heritage as areas which constitute the habitat of threatened species of animals and plants of outstanding universal value. Presumably, without the threatened species of animals and plants, the delineated areas would no longer be of outstanding universal value. As the animals and plants move, so must the 'precisely delineated areas'. In this respect, it is interesting to note the lack of provisions in the Convention itself for delisting of property or adjustment of world heritage boundaries to take account of the extinction of a species or the movement of a species. ¹⁸

In relation to both the cultural and natural heritage definitions provided in articles 1 and 2, each definition notes that the example provided must be of outstanding universal value from various points of view. These points of view include history, art, science, aesthetic, ethnological, anthropological, conservation and beauty. One must ask the question : are these terms too broadly defined and loosely used?

Despite the fact that articles 1 and 2 are not statements of the precise meaning of the term, they provide for an extraordinarily broad interpretation of those areas that may be considered of outstanding universal value. It is, accordingly, within the auspices of each signatory State to define such broad ranging definitions from either

¹⁷ Suter, op. cit., page 9.

¹⁸ See penultimate section of this Chapter on What is Not in the Convention. The King Billy and Huon pines are under threat of extinction and it is acknowledged that endangered species, such as the Leadbetter's Possum are renowned for the vast areas across which they move each year.

It was therefore seen that the resources and methods provided and operations and activities carried out pursuant to the Convention would be complementary to those conservation measures of the various countries that were party to the Convention and implemented its terms and conditions. 'The Convention is designed to complement, to aid and to stimulate national initiatives, but not to compete with them or to take their place.' ¹⁴ But it has been far more than complementary - being used independently of, and in addition to, the traditional domestic legislative and administrative framework of the various signatory States.

Another part of the preamble provides as follows:

Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world, ...

Clearly, the Convention is focused on the protection of any item forming part of the cultural and natural heritage of the world. The preamble makes no reference to the balance that needs to be achieved between the protection of the cultural and natural heritage and the economic and social welfare of the people. It merely states there will be a 'harmful impoverishment' if any item deteriorates or disappears rather than the deterioration or disappearance of items of the cultural or natural heritage of outstanding universal value. In its preamble, it is focused on this protection of any item exempting all other considerations.

The preamble in itself demonstrates there is no room at all for a reduction or depletion of the cultural and natural heritage. Considerations relating to the economic and social well-being of both people and business are not directly incorporated in the preamble.

The signatory parties to the Convention commit themselves to identify and protect, inter alia, those items of the cultural or natural heritage of outstanding universal value. Signatory states are to act as trustees for and on behalf of the citizens of the world both now and in the generations to come.

¹⁴ *ibid.*, page 9.

One may ask how could any country, state, business, entity or person ever be adversely affected by such an esteemed concept or such high aims. But at what cost, in economic and social terms, is the provision of protection of the cultural and natural heritage worthwhile? The nomination and listing procedures and the management of the heritage all affect, to a degree, the economic and social conditions of a community. The protection of the heritage cannot and should not be viewed in isolation.

ARTICLES 1 AND 2: THE CULTURAL AND NATURAL HERITAGE IDENTIFIED

The definitions of the cultural and natural heritage are provided in articles 1 and 2 of the Convention. Article 1 provides that monuments, groups of buildings, and sites constitute cultural heritage, if they are of outstanding universal value. With regard to monuments and groups of buildings, the definition provides that these must be of outstanding universal value from the point of view of history, art or science. In regard to sites, they must be of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

There is no reason provided why sites are not also considered from a scientific point of view, and monuments and groups of buildings are not considered from aesthetic, ethnological and anthropological points of view.¹⁵ The lack of consistency may lead to a lack of understanding and, perhaps, confusion. With regard to the definition of natural heritage¹⁶, three groupings are provided:

natural features consisting of physical and biological formation or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

¹⁵ It is accepted, however, that both ethnology and anthropology are sciences and it may not be possible to study buildings, etc from these viewpoints.

¹⁶ Article 2.

a narrow or broad perspective. The final decision then rests with the World Heritage Committee; the body established to determine if any nomination for the World Heritage list is accepted or rejected.

Although the Convention provides that articles 1 and 2 are both definitions, they should more properly be described as examples or analyses. The Convention does not, for example, make it clear what is the difference between 'aesthetic' and 'natural beauty' in article 2. The Oxford dictionary definition of 'aesthetic' is 'the study of beauty'. All of the points of view referred to in article 2 are disciplines except for 'natural beauty' or perhaps even 'conservation'. Both articles 1 and 2, which are designed to define the cultural and natural heritage of outstanding universal value, are ambiguous and provide a poor set of quantitative and qualitative values upon which signatory States and others can evaluate their own heritage. In fact, there is no definition of outstanding universal value in the Convention.¹⁹

ARTICLE 3: STATE PARTY'S PRE-NOMINATION PROCESS

Article 3 provides that each State party to the Convention is to identify and delineate the different properties situated on its territory referred to in articles 1 and 2. Accordingly, areas not within the territory of a signatory to the Convention, it can be argued, should be excluded from consideration for listing purposes. For example, the Antarctic, which most countries would agree is, at least in part, of outstanding universal value, has not been considered as such under the current framework and procedures of the Convention. Under article 11, each State party is to submit to the World Heritage Committee an inventory of properties that form part of the cultural and natural heritage in its territory, and which are suitable for inclusion on the World Heritage list. The inventory is to be accompanied by documentation of the location and significance of the property. Article 11(1) provides that every State party to the Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the

¹⁹ This is despite the fact that the Operational Guidelines as revised February 1995 at page 2 states that articles 1 and 2 provide the definition. See Appendix.

cultural and natural heritage in its territory suitable for inclusion on the World Heritage List. Article 11(2) provides that:

On the basis of the inventory submitted, the Committee shall establish ... a World Heritage list ... as defined in articles 1 and 2 of the Convention which it considers as having outstanding universal value in terms of such criteria as it shall have established.

The established criteria are published in the Operational Guidelines, which are set out in the appendix to this thesis.²⁰ With respect to the Operational Guidelines revised in March, 1992 Paragraph 35 of the Guidelines simply rewrites article 2 of the Convention. Paragraph 36 provides the criteria which must be fulfilled prior to the natural heritage property being considered of outstanding universal value. The natural heritage property must meet one or more of the following criteria set out in paragraph 36(a):

- i) be outstanding examples representing the major stages of the earth's evolutionary history; or*
- ii) be outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment, as distinct from the periods of the earth's development, this focuses on ongoing processes in the development of communities of plants and animals, land forms and marine areas and fresh water bodies; or*
- iii) contains superlative natural phenomena, formations or features, for instance, outstanding examples of the most important ecosystems, areas of exceptional natural beauty or exceptional combinations of natural and cultural elements; or*
- iv) contains the most important and significant natural habitats where threatened species or animals or plants of outstanding universal value from the point of view of science or conservation still survive.*

In addition to satisfying one or more of the criteria, the natural heritage property must fulfill 'conditions of integrity' which are provided in paragraph 36 of the Operational Guidelines. Particular reference should be made to paragraph 36(b)(v) of these Operational Guidelines which provides as follows:

²⁰ Operational Guidelines for the Implementation of the World Heritage Convention, revised February 1995.

In the case of migratory species, seasonable sites necessary for their survival, wherever they are located, should be adequately protected. Agreements made in this connection, either through adherence to international conventions or in the form of other multilateral or bilateral arrangements would provide this assurance.

It is not inconceivable that a site may meet the criteria established in paragraph 36(a)(i) to 36(a)(iii), but with respect to paragraph 36(a)(iv), relating to the most important and significant natural habitats, the condition of integrity established in paragraph 36(b)(v) may not be established. It is of interest to note the 1995 Operational Guidelines address these concerns by requiring an appropriate management plan to be in place to cater for this possibility. In order for the listing to proceed both the criteria in the Convention and the Operational Guidelines should be satisfied.

ARTICLES 4 AND 5: RESPONSIBILITIES TO IDENTIFY, PROTECT AND CONSERVE

Articles 4 to 7 contain obligations and responsibilities in which each State party to the Convention is required to identify, protect and conserve the World Heritage. This is the second part of the Convention. The extent to which the words of these Articles are binding has been debated in the High Court. Gibbs C J questioned the binding nature of these obligations and responsibilities in the Franklin Dam case:

*Secondly, the words used in describing the obligations which the States Parties to the Convention assume differ materially from one article to another ... At first sight, these obligations might appear to be absolute, although in some cases a further examination of their provisions and of the context in which they appear make it doubtful whether an absolute obligation is intended to be created.*²¹

The majority in the Franklin Dam case agreed, however, that the words of the Convention could be interpreted by the Federal Government as binding and, inter alia, the relevant sections of the World Heritage Properties Conservation Act 1983, as enacted, were within power.

²¹ *Tasmania v Commonwealth*, (1983) 46 ALR 625 at 658.

Articles 4 and 5 contain the duties and obligations of the States party to the Convention with respect to identifying, protecting and conserving the different properties identified and delineated as having outstanding universal value in article 3. Gibbs C J said in the Franklin Dam case: 'The meaning and effect of articles 4 and 5 will be of great importance in the present matter.'²²

Notwithstanding that the process of negotiating an international agreement on the environment will give rise to a broadly defined non-prescriptive law, it is disappointing that articles 4 and 5 are so ambiguously worded as to necessitate the supreme court in the land of a signatory State to rule on the constitutionality of domestic legislation based supposedly on the "binding" nature of these two articles.

Article 4 provides as follows:

Each State Party to this Convention recognises that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in articles 1 and 2 and situated on its territory, belongs primarily to that state. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Reference is made in particular to the second sentence of article 4 which reads : '... it will do all it can to this end, to the utmost of its own resources ...'. Do these words necessarily imply 'subject to and conditional upon the economic, social and community needs at that time'. The article does not include constraints such as 'subject to and conditional upon the economic, social and community needs at that time'. There appear to be no other factors taken into account prior to listing a property for World Heritage other than it being of outstanding universal value.

It is interesting to note that there is no disclaimer in article 4 but there is in article 5. Article 5 provides, in part, '... each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country, ...'. It seems almost incongruous that article 5 follows article 4. The words 'as appropriate for each country' could imply subject to and conditional upon the economic, social, and

²² *ibid.*, page 659.

community needs of that country. Article 4 is deficient to the extent that it does not expressly include these words.

Secondly, reference is made to the duty of the signatory State to identify, protect and conserve these outstanding universal values as being a duty which belongs primarily to that signatory State. It could be interpreted that the remaining duty to identify, protect and conserve rests with the World Heritage Committee. If this is not the case, then it is difficult to understand what or who else has the duty. Assuming it is the case, what right does the World Heritage Committee have to perform these functions? Does this right rest, in part, with other signatory States, and, if so, to what extent?

Article 5 is ambiguous and conflicts with article 4. Article 5 provides as follows:

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country:

- a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;*
- b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;*
- c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;*
- d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and*
- e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.*

As may be noted in the introductory words to article 5, reference is made to the 'protection, conservation and presentation of the cultural and natural heritage.' The Convention does not make it clear how it is possible to ensure that effective and active measures are taken for the presentation of the cultural and natural heritage.²³ Article 4, however, provides 'the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage'. It is difficult to understand the meaning of the word 'presentation' in these articles and thus one questions how a State party to the Convention can be obligated to meet this requirement.

*The language of these articles (4 and 5) is non-specific; the Convention does not spell out either the specific steps to be taken for the protection, conservation and presentation of the cultural and natural heritage situated on a State Party's territory nor the measure of resources which are to be committed by the State Party to that end.*²⁴

Article 5(d) repeats the word 'appropriate' in the first line. The third line refers to the 'identification' of this heritage. The introductory words to article 5 request the State parties to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage and, accordingly, it seems incongruous that article 5(d) can request the signatory states to take the appropriate steps for the identification of such areas, yet again. The identification of such areas has undoubtedly taken place. It repeats the requirements of article 4 without reference to 'transmission'.

Gibbs C J made some strong criticisms of the wording of the Convention and, in particular, article 5. He said this about article 5(a):

²³ Brennan J in the Franklin Dam case at page 777 said:

"The duty of 'presentation' is not easily understood. The *travaux* show that the term was inserted in the English text of the Convention in place of the terms 'development' or 'active development' after objection to the use of the latter term ... The duty thus requires the protection and conservation of the features which give the property its outstanding universal value. It is the 'object and purpose' of the Convention to ensure that those features are protected and conserved."

²⁴ Brennan J, *ibid.*, page 776.

That obligation could hardly be more vaguely expressed ... The very nature of these obligations is such as to indicate that the State Parties to the Convention did not intend to assume a legal obligation to perform them. ²⁵

In addition, Mason J made the following observations and comparisons of articles 4 and 5 and article 6:

The word 'undertakes' which is apt to create such an obligation is conspicuous by its absence from articles 4 and 5. Its absence in these articles is to be contrasted with its presence in article 6.2 and 6.3. ²⁶

Wilson J concluded:

Finally, on the question whether articles 4 and 5 give rise to any obligation, it will be observed that the Convention makes no provision for handling any complaints or resolving any disputes.

The absence in articles 4 and 5 to an 'undertaking' and reference to any method for dealing with disputes is particularly concerning in a federation such as Australia. The very real prospect of dispute between the Federal and State Governments was apparent when the Convention was drafted. ²⁷

Nevertheless, despite the criticism of the wording and format of articles 4 and 5, Brennan J stated: 'There is a clear obligation upon Australia to act under articles 4 and 5, though the extent of that obligation may be affected by decisions taken by Australia in good faith.' ²⁸ It appears that the body of opinion is in favour of the existence of an obligation but the extent of that obligation is unclear. It becomes very much a decision for the signatory State to make its own interpretation and assessment of the obligation, and then to act upon it. The problem which emanates from such a process is the ability and tendency of the federal government to use this apparent obligation for political purposes.

²⁵ *ibid.*, page 660 and 661.

²⁶ *ibid.*, at page 697.

²⁷ *ibid.*, at page 749.

²⁸ *ibid.*, at page 777.

ARTICLE 6: PROTECTION OF PROPERTY RIGHTS

Article 6 imposes an obligation on the State parties which is international and broad ranging. Article 6(1) also states that the Convention fully respects the sovereignty of the States on whose territory the cultural and natural heritage may exist. It further provides that this obligation should be without prejudice to property rights provided in national legislation.

Two points can be made in regard to this reference to property rights and national legislation. Firstly, the Convention states 'without prejudice' which could be read as a negative disclaimer, ie: without damaging property rights in existence. In essence, no reference is made in this article to the need and benefit of showing respect and honour for the various forms of property rights.

Secondly, the property rights referred to have to be those property rights which are provided by national legislation. It could be argued this article does not provide for property rights granted by state or local government legislative means or by other means, such as by common law. Even if national legislation is defined so broadly as to include all legislative measures, it would appear a glaring omission indeed that the rights at common law should be neglected. If this is the case it demonstrates a scant regard for the rights of private land owners. It is, however, consistent with the first draft of the Convention which made no provision for the sovereignty of the State parties, ie: to make nominations.²⁹ Notwithstanding the above Kiss and Shelton hold the view that "territorial sovereignty over elements of the world natural heritage is respected."³⁰

Article 6(2) provides that a State party undertakes to provide assistance and help to other State parties which request such assistance and help. Although this article states that such an undertaking is given in accordance with the provisions of this Convention, it can only be assumed that it is subject to and conditional upon the economic, social and other circumstances appropriate to each country. Gibbs C J

²⁹ See first draft of the World Heritage Convention, 1971.

³⁰ Kiss. A, and Shelton. D, "International Environmental Law" Graham Trotman 1991 at page 245

said that the obligations imposed by the Convention are political or moral, but not legally binding.³¹ Use of the word 'undertaking' in this article is misleading.

Article 6(3) provides that each State party undertakes not to take any deliberate measure which might damage directly or indirectly the cultural and natural heritage on the territory of other State parties. Such a protection would seemingly apply in peace time and in war time. It is noted that the Hague Convention relates to the protection of cultural property in the event of war, however, it does not relate to the protection of natural property (in accordance with the broad definition given it pursuant to the World Heritage Convention.)

This provision, if implemented without consideration being given to the economic and social consequences of the protection imposed, would be debilitating. The article provides that no deliberate measures be taken that might damage directly or indirectly the heritage. This article, if read alone, takes no account of the economic, social and other circumstances prevailing at the time.

ARTICLE 7: INTERNATIONAL CO-OPERATION AND ASSISTANCE

Article 7 again relates to the obligation imposed at an international level which seeks to establish a system of international co-operation and assistance designed to support State parties to the Convention in their efforts to conserve and identify both areas or places of outstanding universal value. It is unclear why the words 'conserve and identify' are used and not the words used in article 4 being 'the identification, protection, conservation, presentation and transmission ...'. In any event, the obligations imposed under article 7 are additional obligations which could be argued as being complementary to existing 'national' obligations.

ARTICLES 8, 9 and 10: THE WORLD HERITAGE COMMITTEE

Articles 8 to 14 provide for the establishment and functioning of the World Heritage Committee and create a network of advisory bodies. This is the third part of the Convention.

³¹ *Tasmania v Commonwealth*, 46 ALR 625 at page 663. Gibbs, C.J. was in the minority however in this 4 to 3 decision.

Article 8 provides for the establishment of the World Heritage Committee, which provides the institutional and administrative framework for the implementation of the World Heritage Convention. The World Heritage Committee is the major policy and decision-making body established under the Convention. It has a number of advisory bodies, as provided in article 8(3) – the International Centre for the Study of the Preservation and Restoration of Cultural Property (the 'ROME Centre') the International Council of Monuments and Sites ('ICOMOS') and the International Union for Conservation of Nature and Natural Resources ('IUCN'). These institutions provide technical and detailed advice to the World Heritage Committee, or the World Heritage Committee via the World Heritage Bureau.

After careful checking by the Secretariat of the Committee, the nomination forms are sent for technical assessment to ICOMOS or IUCN. These professional bodies submit their evaluations to the Bureau of the Committee which meets in June of each year.

The Bureau's job is to carry out a preliminary screening and make recommendations to the Committee's autumn session as to the sites that should or should not be accepted for the World Heritage List.

The intrinsic qualities of the nominated properties, although paramount, are not sufficient in themselves, for the Committee also expects nominating countries to show that they are able to ensure the protection of potential World Heritage sites.

*The annual cycle of nomination, evaluation and inscription has been in operation since 1978. The list's rate of growth has been striking since that first year, with an average of 30 new properties added annually.*³²

Article 8(1) originally provided that the World Heritage Committee be composed of 15 State parties to the Convention, elected by the State parties at their meeting in General Assembly. Following the coming into force of the Convention for at least 40 State parties, the number of State members of the Committee increased to 21 at the second General Assembly, in accordance with article 8(1). The second General Assembly was held in 1976 – a little more than three years after UNESCO's

³² The World Heritage Convention – An Idea in Action, UNESCO, October 1988, page 4.

adoption of the Convention. The United States was the first to sign the Convention on 7 December 1973. Australia signed it in August 1974.³³

Article 8(2) provides for the Committee to be broadly representative of different regions and cultures of the world. It is interesting to note that article 8(3) provides an open invitation to the World Heritage Committee meetings, at the request of State parties, to representatives of other intergovernmental or non-governmental organisations with similar objectives. These representatives may attend in an advisory capacity. It is not clear how many extra representatives are allowed and on what basis they are permitted to attend other than the fact that they must have 'similar objectives'. However, there is provision for these advisory representatives in article 13(7), which states that the Committee shall co-operate with them. The power and influence of the advisory bodies established under the Convention is significant. The advice and recommendations of its official advisory bodies is usually accepted by the World Heritage Committee.

The original World Heritage Committee was elected at the second General Assembly of State parties to the Convention, held in Nairobi in 1976. The World Heritage Committee meets once in the second half of each year, usually to consider the various nominations for listing purposes. Professor Ralph Slayter, who has been actively involved in the World Heritage Convention since its inception and led the Australian Delegation for sessions of the World Heritage Committee from 1979 to 1983, during which period Australia's first five properties were inscribed on the World Heritage List (he was elected to Vice-Chairmanship of the Committee in 1980-81 and the Chairmanship in 1981/82, and again in 1982/83) said the following about the role of the World Heritage Committee and its advisory bodies:

In fulfilling this role, the Committee realised at its first session that it needed to generate rules of procedure and operational guidelines, to provide a firm basis for its activities and to ensure that it acted in an objective and professional manner. The early sessions spent a good deal of time on these matters and the procedures which have evolved appear to be working fairly well.

³³ Dr Moss Cass, Minister for the Environment, said in a media statement on 3 September 1974 that at that time Australia was one of the five signatories to the Convention.

A central element of these procedures was the recognition by the Committee that it was not an expert Committee ...

*The role of the two non-governmental organisations (NGOs) which act as the Committee's official non-government advisers – IUCN and ICOMOS – was therefore recognised as being the key to providing detailed professional evaluations of each nomination. With the passage of time, the importance of the role played by these bodies has increased and it is rare that the Committee overturns a recommendation from IUCN or ICOMOS. Because the role played by the NGOs requires detailed evaluation of their reports, the Bureau of the Committee, the Executive comprising of chairman, vice-chairman and rapporteur, also plays a key role in the work of the Committee.*³⁴

The World Heritage Committee is responsible for the World Heritage List, the World Heritage In Danger List and the operations and disbursements of necessary remedial measures. The World Heritage list is a list of all those properties that have been nominated by State parties and subsequently accepted by the World Heritage Committee as being of outstanding universal value as defined in articles 1 and 2, and placed on a list of properties as part of the world's cultural and natural heritage.

The World Heritage In Danger list includes properties that are 'threatened by serious and specific dangers, such as the threat of disappearance, large scale public or private projects, or rapid urban or tourist development projects, destruction caused by the changes in the use of ownership of the land, major alterations due to unknown causes, abandonment for any reason whatsoever, the outbreak of the threat of armed conflict, calamities and cataclysms, serious fires, earthquakes, landslides, volcanic eruptions, changes in water level, floods and tidal waves.'³⁵ The Convention provides that the Committee may at any time make a new entry on this list 'in case of urgent need'.³⁶

Brennan J gave an impression of the proactive nature of the World Heritage Committee in the Franklin Dam case.

³⁴ Professor Ralph Slatyer, Director, Research School of Biological Sciences, Australian National University, *Heritage Australia*, Volume 8, No. 2, Autumn 1989, *The Journal of the Australian Council of National Trusts*, page 4.

³⁵ Article 11 (4).

³⁶ Article 11 (4).

When the Committee included the Parks in the list it expressed concern at the likely effect of the dam construction:

*The Committee is seriously concerned at the likely effect of dam construction in the area on those natural and cultural characteristics which make the property of outstanding universal value ... The Committee suggests that the Australian authorities should ask the Committee to place the property on the list of World Heritage in Danger until the question of dam construction is resolved.*³⁷

The Committee gave the strong impression that if the Australian authorities requested the property be placed on this list, then it would be so listed. Understandably at the time during the heated political protests and debate about the Franklin dam this was a politically provocative statement. Article 9 specifies the duration of the term of office for members of the Committee. The various State parties shall choose their own representative persons qualified in the field of cultural or natural heritage. Article 10 provides for the Committee to adopt its own Rules of Procedure. It provides the Committee with the discretion to invite public or private organisations or individuals to participate on a consultative basis.

ARTICLES 11 AND 12: THE NOMINATION PROCEDURE

Article 11(1) provides that 'every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property ... suitable for inclusion in the list.' This inventory, it states, shall include documentation about the location of the property in question and its significance.

The aim of requiring these lists is to enable the Committee and the NGOs to carry out the comparative and serial studies which are necessary for a methodical approach for building up the World Heritage List.

*The World Heritage Committee has specified that 'priority will be given to the consideration of nominations (of natural heritage properties) from state parties which have submitted a tentative list, unless the state party has given a specific explanation why it cannot be provided'*³⁸

³⁷ Tasmania v Commonwealth 46 ALR 625 at 780.

³⁸ Juliet M Behrens (nee Bedding), Lecturer in Law, University of Tasmania, Paper delivered at Our Common Future workshop, University of Tasmania, July 1990.

Australia has, to date ³⁹, still not prepared and fully completed this inventory. The Convention provides that, on the basis of this inventory, the World Heritage Committee would keep up to date and publish a World Heritage List – to be distributed at least every 2 years. ⁴⁰

These tentative lists are indispensable to the evaluating bodies – ICOMOS and IUCN – for they provide them with the advance notice they need in order to prepare objective comparative assessments and to discuss the issues involved with the nominating national authority.

⁴¹

Article 11(3) provides that the inclusion of the property on the World Heritage List requires the consent of the State party concerned. However, an earlier draft of the World Heritage Convention did not require this consent of the State party prior to nomination. It could be argued this omission in the earlier draft is evidence of the proclivity of the draftsmen of the Convention to disregard the sovereignty of the signatory States.

Despite the fact that Australia has not met the requirements of article 11(1), the World Heritage Committee invites and accepts properties nominated by it as a State party. The nomination forms must be forwarded to the World Heritage Committee by the 1st October for consideration and assessment. The World Heritage Committee transmits the nomination and supporting evidence to the relevant advisory body, eg : ICOMOS or IUCN. The advisory body advises the World Heritage Bureau in June of the following year, and the Bureau, upon its own assessment and analysis, forwards the nomination and its recommendations to the World Heritage Committee prior to the final consideration by the Committee in December of that year. ⁴²

³⁹ As at 30 June 1994. Through personal discussions with DEST representatives, it is understood efforts are now under way to prepare the inventory. The list of outstanding cultural properties, it is understood, has been prepared and the outstanding natural properties list is currently being prepared. A complete list of both types of properties has not, to date (August 1994) been made available to the public.

⁴⁰ Article 11 (2).

⁴¹ The World Heritage Convention – an idea in action, UNESCO, October 1988, page 3.

⁴² Further detail is provided with respect to this process in Chapter 5.

*The nomination will need to cover three issues. First, there will need to be a resource inventory of the region under consideration; the flora and fauna of the region; plus other necessary information. Second, the boundary of the region should be clearly defined so as to encompass all the significant elements and also to ensure that the integrity of the area (if listed) is protected. Finally, the nomination will need to contain a detailed management regime for the proposed listing.*⁴³

It is interesting to note that article 12 specifies the consequences if the World Heritage Committee does not accept the nomination. Article 12 provides as follows: '[non-acceptance] shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists.' Thus despite the cultural or natural heritage not being placed on a list, according to article 12 it still may be considered of world heritage value.

Article 12 may cause some difficulties for State parties in their efforts to nominate and list areas of World Heritage value. The Convention requires each State party to identify, protect and conserve all properties of outstanding universal value, and, if the property fits the definition and satisfies the criteria and tests of integrity, it should be nominated for listing. If it is not accepted as worthy of listing as it is submitted one should be able to presume it did not meet the relevant criteria and requirements, and thus is not an area of World Heritage value. Article 12 may therefore be somewhat confusing.

The World Heritage Committee has prepared a World Heritage List Nomination Form. This is provided to assist State parties in the completion of the nomination. Part 5 of the form is headed 'Justification for inclusion in the World Heritage List' – a statement to be made on the significance (i.e., its outstanding universal value in the terms of the Convention) of the property that justifies it for inclusion in the World Heritage List. Property will be evaluated against the criteria adopted by the World Heritage Committee. The following extract from the Report of the

⁴³ Dr Keith D Suter, Foundation Director, Trinity Prince Research Institute, The UNESCO World Heritage Convention, *Environmental and Planning Law Journal*, March 1991, page 11.

Commission of Inquiry into the Lemonthyme and Southern Forests refers to this criteria.⁴⁴

5b) for natural property, outstanding universal value will be recognised when a natural heritage property – as defined in article 2 of the Convention – submitted for inclusion in the World Heritage List, is found to meet one or more of the following criteria. Therefore, properties nominated should...

iii) contain unique, rare or superlative natural phenomena, formations or features or areas of exceptional natural beauty, such as superlative examples of the most important ecosystems to man, natural features (for instance, rivers, mountains, waterfalls), spectacles presented by great concentrations of animals, sweeping vistas covered by natural vegetation and exceptional combinations of natural and cultural elements, or...

It should be realised that individual sites may not possess the most spectacular or outstanding single example of the above, but when the sites are viewed in a broader perspective with a complex of many surrounding features of significance, the entire area may qualify to demonstrate an array of features of global significance.

In addition to the above criteria, the sites should also meet the conditions of integrity:

The areas described in i) above should contain all or most of the key interrelated and interdependent elements in their natural relationships; for example, an 'ice age' area would be expected to include the snow field, the glacier itself and samples of cutting patterns, deposition and colonisation (striations, moraines, pioneer stages of plant succession, etc).

The areas described in ii) above should have sufficient size and contain the necessary elements to demonstrate the key aspects of the process and to be self-perpetuating. For example, an area of 'tropical rain forest' may be expected to include some variation in elevation above sea level, changes in topography and soil types, river banks or oxbow lakes, to demonstrate the diversity and complexity of the system.

⁴⁴ Commission of Inquiry into the Lemonthyme and Southern Forests, Volume 2, Canberra, Australian Government Publishing Service, 1988 at page 571.

The areas described in iii) above should contain those ecosystem components required for the continuity of the species or of the objects to be conserved. This will vary according to individual cases; for example, the protected area for a waterfall would include all, or as much as possible, of the supporting upstream watershed; or a coral reef area would be provided with control over siltation or pollution through the stream flow or ocean currents which provide its nutrients.

the areas described in iv) above should be of sufficient size and contain the necessary habitat requirements for the survival of the species.'

There are minor variations between the terms and conditions set down in the nomination form relating to both the cultural and natural property compared to the terms and conditions established in the Operational Guidelines, eg: 5 (b) (iii) of the nomination form compared to 36(a)(iii) of the Operational Guidelines. To the extent that these differences between the nomination form and the guidelines are relevant, it is interesting to note the views presented in the Report of the Commission of Inquiry Into the Lemonthyme and Southern Forests,⁴⁵ which provide as follows:

Some queries were raised internally as to the proper approach of the Commission to the determination of World Heritage Areas and the use of the World Heritage Guidelines and Nomination Forms. They prompted the Commission to seek a legal opinion from the Attorney-General's Department which confirmed that the way in which the Commission and participants had approached the matter was the correct one, and also that it should take into account the criteria and the Nomination form.

In general terms it can be said that the criteria and conditions of integrity of the Guidelines do not dilute the rigour of the requirements of the definitions of cultural heritage and natural heritage in articles 1 and 2 of the Convention...

In an instance referred to later in the Report, the nomination form appears to be inconsistent with the Guidelines. In any case of inconsistency between these documents, the Commission has no doubt that the Convention prevails over both the Guidelines and the Form, and the Guidelines prevail over the Form.

⁴⁵ Volume One, 1988 page 26.

Accordingly, where an inconsistency does or may arise, the approach used by the Commission of Inquiry into the Lemonthyme and Southern Forests, that the Convention prevails over both the Guidelines and the Form, and the Guidelines prevail over the Form, seems sensible and appropriate.

ARTICLES 13 AND 14: ANCILLARY ORGANISATIONS

Articles 13 and 14 relate to the administrative procedures for the operations of the World Heritage Committee and the interaction it has with the ROME Centre, ICOMOS, IUCN and the Director General of UNESCO. The Committee is obliged to draw up, keep up to date and publicise a list of property for which international assistance has been granted.

Article 13(8) provides that all decisions taken by the Committee shall be by a majority of two thirds of its members present and voting. This is a sensible provision, particularly as it relates to the use of financial resources contributed by the signatory states. However, there is no reference to the settling of disputes between Federal and State Governments with regard to funding World Heritage management programs. In Australia there is normally a series of negotiations between Federal and State Government representatives to agree on funding arrangements for World Heritage areas.⁴⁶ Again, there appears to have been a failure to recognise the inherent difficulties in meeting the objectives of the Convention in a signatory State with a federation of states, apart from those provisions set out in clause 34.

ARTICLES 15 TO 18: THE WORLD HERITAGE FUND

Articles 15 to 18 relate to the funds for the protection of the world's cultural and natural heritage – the World Heritage Fund. This is the fourth part. State parties to the Convention undertake to pay, every two years, to the World Heritage Fund contributions which are usually in the vicinity of 1% of the contribution of the State parties to the regular budget of UNESCO. Donations are also accepted from private organisations and individuals.

⁴⁶ This is discussed in further detail in Chapters 5, 6 and 8.

The World Heritage Committee allocates the annual budget of the fund (World Heritage Fund) – US\$2.7 million in 1988 – to a wide range of activities, classified as follows: preparatory assistance; technical co-operation; training; and emergency assistance. ⁴⁷

The Convention is designed to provide a mechanism by which State parties unable to fulfill their responsibilities and duties as trustees will receive financial and other support "in kind" from other State parties or the World Heritage Fund established for distinctly that purpose.

The Fund is established to meet urgent needs of State parties as referred to in article 11(4) relating to the World Heritage In Danger List, but also to support efforts for the identification, protection and conservation of relevant properties pursuant to the general aims of the Convention. State parties may request assistance for studies and research, training and equipment.

ARTICLES 19 TO 26: CONDITIONS FOR ASSISTANCE

Articles 19 to 26 relate to the conditions and arrangements for international assistance – the assistance requested by States party to the Convention. The assistance referred to relates to the relevant properties within a State's territory that may be in danger, and a request should define the operation contemplated, the work that is necessary, the expected costs thereof, the degree of urgency and the reasons why the resources of the State requesting assistance do not allow it to meet all the expenses. Such requests must be supported by expert's reports whenever possible.

⁴⁸ Gibbs C J in the Franklin Dam case said: 'The practical importance of listing a property on the World Heritage list is that the listing satisfies a condition precedent to the grant of assistance by the World Heritage Convention.' ⁴⁹

Article 25 provides that the contribution of the State party benefiting from international assistance shall constitute a 'substantial share' of the resources devoted to each program or project, unless its resources do not permit this. Accordingly, as a matter of course the national government of the State party should ensure that an

⁴⁷ UNESCO, The World Heritage Convention – An Idea in Action, October 1988, page 4.

⁴⁸ Article 21.

⁴⁹ Tasmania v Commonwealth, 46 ALR 625, at page 659.

appropriate management regime is already in place with adequate finance to support this management regime. This has not occurred in the case of world heritage nominations in Tasmania. The final world heritage management plan was not approved until 10 years after the initial nomination.⁵⁰

ARTICLES 27 AND 28: EDUCATIONAL PROGRAMS

Articles 27 and 28 relate to the educational programs that may be undertaken by State parties to the Convention. Article 27 provides that State parties shall endeavour by all appropriate means, and, in particular, by educational and information programmes, to strengthen appreciation and respect by their peoples of the cultural and natural heritage.

The State parties should warn the community of any dangers threatening the heritage. How this is done in a federal system of government is not specifically provided. Article 28 provides that if assistance is received the State party should advise the public of the reason for the assistance.

ARTICLE 29: REPORTING TO UNESCO

State parties are obliged to include in their reports to UNESCO 'legislative and administrative provisions adopted' pursuant to the Convention 'together with details of the experience acquired in this field'. Australia was the only country to have enacted legislation to implement the Convention⁵¹ and this initiative would have been included in these reports to UNESCO. The litany of conflict and controversy in World Heritage listing, particularly from a litigious viewpoint, would make these reports unique.

⁵⁰ The Tasmanian Wilderness World Heritage Area Management Plan was approved 30 September 1992. Further details are provided in Chapter 8.

⁵¹ As at 1983, World Heritage Properties Conservation Act 1983.

ARTICLES 30 TO 38: MISCELLANEOUS ARTICLES AND STATE SOVEREIGNTY

The eighth and last part of the Convention include Articles 30 to 38. The most relevant of these articles, as far as State sovereignty is concerned, is article 34. This is necessarily important to Australia as it has a federal constitutional system. Article 34 is a provision relating to federal or non-unitary constitutional systems. The implementation of the Convention in Australia derives in part from an ambiguously worded article 34. Article 34(a) provides that the obligations of the federal or central government shall be the same as for those State parties which are not federal states. This does not appear unusual *prima facie*. However, article 34(b) provides:

with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption. (emphasis added)

There is no doubt that a significant portion of the "implementation" of the Convention is carried out by the states, provinces or cantons in a federal or non-unitary system of government although the final decision-making authority pursuant to the Convention rests with the signatory party, which in each case is the national government. In Australia the authority and responsibility for land use management and conservation measures has historically been held by the various states and territories but the Convention does not clearly acknowledge this. The article makes no provision for, or reference to, the refusal by the relevant state, province, etc to accept the recommendations of the Federal Government. This article of the Convention appears to place a low priority on the traditional and existing constitutional arrangements of federal or non-unitary systems of government. A contrary argument nevertheless has been put by Koester⁵² that countries must accept that international regulation of the environment is necessary,

⁵² Koester, *Environmental Policy and Law* (1990) 20/1/2, page 14 at 18.

even though this would turn traditional notions of sovereignty upside down.⁵³ However Australia's history demonstrates the difficulties imposed in implementing the Convention in a federal system of Government. These latter concerns have been discussed by the leader of the Australian delegation to the World Heritage Convention:

*"Australian State Governments have sought such standing, as have other organisations when some of the Australian nominations have been on the agenda. The Committee had steadfastly refused to give such bodies standing for the very good reason that it cannot allow itself to be put in the position of being seen to interfere in the internal affairs of a particular country. The Committee therefore only receives information formally from state parties – in Australia's case that is the Commonwealth Government and from its official non-government advisory bodies."*⁵⁴

Wilson J in his judgment in the Franklin Dam case said that the World Heritage Convention is distinguished from many other treaties of recent times by the fact that it contains a Federal clause. He went on to say: 'The tone is one of help not of coercion. There is, on this view, no reason to discern an intention to override existing constitutional arrangements within a party to the Convention and the article is included to negate any such intention.'⁵⁵ Despite the probable view of the framers of the Convention the difficulties in implementing the Convention in Australia's system of government remains.

But Wilson J was in the minority and the majority held similar views to Deane J: '...the carrying into effect of the Convention is within the paramount legal jurisdiction of the Commonwealth Parliament by virtue of the express grant of legislative power contained in Section 51(xxix).'

⁵³ See also Schrijver, N, "The Dynamics of Sovereignty in a Changing World" in Ginther, K, Denters, E and de Waart, PJIM. Sustainable Development and Good Governance, Martinus Nijhoff 1995, page 80-80.

⁵⁴ Professor Ralph Slatyer, Director, Research School of Biological Sciences, Australian National University, Heritage Australia, Volume 8, No. 2, Autumn 1989, The Journal of the Australian Council of National Trusts, page 4.

⁵⁵ Tasmania v Commonwealth, 46 ALR 625, at page 750.

⁵⁶ ibid., at page 809.

acknowledgment of a state government's traditional rights to manage land use and conservation appears to have been overridden.

Article 35 provides a mechanism by which State parties can denounce the Convention and thus withdraw – with twelve months notice. The Convention does allow members to remain State parties to the Convention, despite not being a State party to UNESCO. Reference in this regard was made above to the withdrawal of the United States and the United Kingdom from UNESCO but their continuation and involvement as State parties to the Convention.⁵⁷

WHAT IS NOT IN THE CONVENTION

In regard to complaints or disputes within each State party and between the State party and the World Heritage Committee, the Convention, apart from clause 34, is silent. This gap has caused many disputes between the Australian federal government and the various state governments.⁵⁸ The situation has arisen where state government representatives and business organisation representatives have attempted to oppose the decision of the federal government at the World Heritage Committee hearing, and also prior to this at the World Heritage Bureau.

The Convention in itself does not provide an opportunity for signatory States to delist any area or property it may have nominated and which has been accepted.

⁵⁷ No member nation has ever resigned from the UN itself, and very few have ever resigned permanently from its specialised agencies. However in a letter, dated 28 December 1983, the United States Secretary of State, George Schultz, sent to the Director-General of UNESCO, notice was given of the withdrawal of the United States from the organisation with effect from 31 December 1984.

"According to a United States' State Department spokesperson,

'UNESCO has extraneously politicised virtually every subject it deals with, has exhibited hostility towards the basic institutions of a free society, a free market and a free press, and has demonstrated unrestrained budgetary expansion'.

The British Government indicated in November 1984 that the United Kingdom would withdraw from UNESCO by the end of 1985 if certain changes had not by then taken place within the organisation." *ibid.*, page 6.

The United States and the United Kingdom remain outside UNESCO, but nevertheless remain a party to the World Heritage Convention (the United Kingdom ratified the Convention in 1984, just before announcing its intention to withdraw from UNESCO in 1985).

⁵⁸ See Richardson, B J, "A Study of Australian Practice Pursuant to the World Heritage Convention", *Environmental Policy and Law* (1990) Vol 20, page 143.

Accordingly, the sovereignty and independence has been undermined at least in this respect by the Convention.

However, the Operational Guidelines ⁵⁹ provide a procedure for the eventual deletion of properties from the World Heritage List despite the Convention being silent in this regard. Paragraphs 48 to 58 (pages 16 to 18) detail how delisting can occur. The property must have satisfied two conditions. Firstly, that it has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the List, and secondly, where the intrinsic qualities of a world heritage site were threatened (by man) and where the necessary corrective measures have not been taken in the time allowed. Paragraph 42 provides that a decision of the Committee must be made by a two-thirds majority in accordance with article 13(8) of the Convention to enable delisting.

It appears these Guidelines may have been drafted in this way to hide what, in hindsight, was a glaring omission from the Convention itself. Nevertheless, it is not within the purview of the State parties alone, to delist an area, the decision being one for the World Heritage Committee.

CONCLUSION

Although the World Heritage Convention is the world's most ratified agreement on conservation, it has precipitated a litany of controversy and conflict on environmental and land use matters between federal and state governments in Australia. ⁶⁰

The Convention in Australia ⁶¹ has given rise to more litigation and political challenges than anywhere else in the world. ⁶² The Convention is clearly focused

⁵⁹ Operational Guidelines for the Implementation of the World Heritage Convention, revised in February 1995.

⁶⁰ See also Bedding, J M and Tsamenyi, B M. "The World Heritage Convention and its Implementation in Australia", (1988) 3/4 *Kanainoikeus Ius Gentium*, 335 and Mercer, D, "A question of balance; Natural Resources Conflict Issues in Australia" Federation Press (1991).

⁶¹ See Department of Arts, Sport, the Environment, Tourism and Territories, "Australia and the World Heritage Convention", (1992) and "Australia's World Heritage Properties", (1995). Australian Government Publishing Service.

⁶² Suter, op. cit. at page 4.

on the protection of any item of cultural or natural heritage and considerations relating to the economic and social wellbeing of the people are not fairly or adequately taken into account in the Convention itself. The question must be asked at what cost, in economic and social terms, is the provision of the protection of the cultural and natural heritage? The Convention does not provide for the full or comprehensive consideration of these matters.

The nomination, listing and management of the World Heritage will influence, to a degree, the economic and social conditions of the community. The protection of this heritage cannot and should not be viewed in isolation. In many instances, the Convention is ambiguously worded. The extent of the State parties' obligations under the Convention are cause for considerable debate.⁶³

Special reference is made in this Chapter to article 11(1) in which the federal government has been in breach. The article provides that each State party to the Convention must prepare and keep up to date an interim list of properties that may be included on the World Heritage list.

Article 34(a) and (b) of the Convention, the Federal clause, although noting the different types of government in each of the State parties to the Convention, gives rise to internal and domestic problems. The lack of clarity with regard to the priority placed on the sovereignty of the Australian States and Territories has caused enormous conflict between the federal and state and territorial governments in Australia. The cause of this conflict derives primarily from the federal nature of our Constitution. State Governments have received only nominal recognition in the Convention.

Finally, the silence of the Convention itself⁶⁴ in regard to de-listing of areas from the World Heritage list constitutes a major inadequacy. In addition, the lack of a framework to deal with complaints and disputes has been evidenced by representation by state governments and business organisations at World Heritage Committee hearings. This is also an area of inadequacy. In regard to the latter,

⁶³ Note, in particular, the conflicting statements in the Franklin Dam case relating to Articles 4 and 5.

⁶⁴ As opposed to the Operational Guidelines.

Australia has been 'hanging out its dirty laundry' in public before the international community.⁶⁵ This has been unnecessary and unfortunate.

⁶⁵ The Queensland Government and industry groups lobbied heavily against the Federal Labor Government's nomination of the Queensland Wet Tropics in 1988 at the World Heritage Committee meeting in Brazil that year. See also Duncan, Tim, "Our Foreign Masters - Queensland delegation report of the World Heritage Bureau's decision to recommend listing of the Daintree forest," IPA Review Vol 42, Dec/Feb 1988/89, page 11.

Chapter 3

THE NATIONAL ESTATE AND ITS IMPACT ON WORLD HERITAGE LISTING IN AUSTRALIA

INTRODUCTION

The history of the National Estate and its implementation in Australia is vitally important to a full appreciation of not only the rationale for the Federal Government's perspective on the implementation of the World Heritage Convention, but also an understanding of the history of heritage protection and conservation generally. For example, more than 37% of Tasmania is either listed, interim listed or on the register of the National Estate.¹ The implications of this for the forest industry have been enormous. The Resource Assessment Commission reported on the impact of the Australian Heritage Commission Act 1975 (hereinafter referred to as 'the Heritage Act') on forest operations Australia-wide, as follows:

*'The role of the Australian Heritage Commission Act has had such a significant impact on forest use in Australia, however, that some observations on the impact of the National Estate listing and options for change are appropriate.'*²

In this chapter the background to, and the processes of, the National Estate regime are considered and analysed. How the implementation of this regime, from as early as 1975, set the framework in which Australia's world heritage could, and would, be assessed is demonstrated. The inevitable overlap in assessment processes is discussed. The question is posed as to whether the National Estate can be described as a new system of National Parks. This is followed by an assessment of the heritage criteria, the Federal Government's role,³ and the consultation process

¹ As at June 1992, Australian Heritage Commission. See also Leslie, R G, Mackey, B B and Schulmeister, J, "National Wilderness Inventory - Wilderness Quality in Tasmania". Report to the Australian Heritage Commission (1988).

² Resource Assessment Commission (RAC), Forest and Timber Inquiry Draft Report, Volume 2, July 1991, at page L 11.

³ See also Boer, B, "Review of the Commonwealth's Role in the Conservation of the National Estate" (1986) 3 Environmental and Planning Law Journal, 83.

undertaken by the Australian Heritage Commission. The argument that National Estate listing is *de facto* land-use decision making is considered and the chapter concludes with a description of the proposed legislative reforms and other possible reforms. The differences in the listing and management processes between world heritage and the National Estate are set out in a chart in the appendix to this thesis. Also included in the appendix is the nomination process for the register of the National Estate, a world heritage organisational chart and an outline of the process of inscribing places on the world heritage list.

HISTORY

The concept of the 'National Estate' was derived from the Report of the Committee of Inquiry into the National Estate (the 'Hope Commission' – Chaired by Mr Justice R Hope).⁴ The Committee was charged with inquiring into and advising the Australian Government on:

- a) the nature and state of the National Estate;*
- b) the measures presently being adopted;*
- c) the measures which should be adopted;*
- d) the role which the Australian Government could play in the preservation and enhancement of the National Estate;*
- e) grants which could be made by the Australian Government to the National Trusts of Australia and other appropriate conservation groups in order that these bodies can immediately increase their effectiveness in arguing and working for the preservation and enhancement of the National Estate.*

The Committee opted for a very broad definition of the National Estate as follows :

⁴The Committee was established in April 1973 by the Whitlam Labor Government. The eight member Committee of Inquiry began its deliberations in May 1973 and considered more than 650 submissions from government, community and professional bodies as well as from individuals. Its Report was delivered to the Federal Government in April 1974.

Those elements of such outstanding world or national significance that they had to be conserved, managed and presented as part of the heritage of the world or the nation as a whole; and those elements of such aesthetic, historical, scientific, social, cultural, sociological or other special value to the nation or any part of it, that they should be conserved, managed and presented for the benefit of the community as a whole. ⁵

The Whitlam Labor Government subsequently enacted the Heritage Act. ⁶

Accordingly, eight years before Australia's endorsement of the World Heritage Convention in the legislative form of the World Heritage Properties Conservation Act 1983, it had already established a body charged with the task of identifying areas of national and world heritage importance. The Australian Heritage Commission (hereinafter referred to as 'the Commission') was created under the Heritage Act. ⁷ Surprisingly and problematically, the Act does not specifically require that items be of either 'world' or 'national' significance. S.4 defines 'heritage' as:

Those places, being components of the natural environment of Australia, or the cultural environment of Australia that have aesthetic, historic, scientific or social significance or other special value for future generations as well as the present community.

This is a very broad definition that can be subject to varying interpretations. What is the meaning of the definition 'significance or other special value'. Surely, aspects of special value such as 'beauty' are in the eye of the beholder. It is submitted these concerns would be lessened if some reference were made to these places being of world or national significance.

There is a very clear link between the National Estate listing procedures and the World Heritage listing procedures in Australia. Specific reference was made in the joint media statement by the Hon. Tom Uren and the Hon. Dr Moss Cass on the 19 September 1974 that the 'National Estate' included elements of such outstanding world or national significance. Accordingly, a legislative and administrative

⁵ Joint statement to the Federal Parliament by the Hon. Tom Uren and Hon. Dr Moss Cass, 19 September 1974.

⁶ Proclaimed in June 1975.

⁷ See Yenchen, D, "The Australian Heritage Commission" (1976-77) 117 *Environs*, 17.

framework for the implementation of the World Heritage Convention had already commenced. The method of listing Australia's own National Estate and World Heritage, as defined in this joint statement to the Federal Parliament is directly relevant to how Australia has responded and may continue to respond to the nomination and listing of areas or items of world heritage status in Australia.

A further link can be shown in the similarity of definitions. The Australian Heritage Commission Act 1975 provides:

In section 3 'place' includes –

- a) a site, area or region;*
- b) a building or other structure (which may include equipment, furniture, fittings and articles associated with or connected with such building or other structure); and*
- c) a group of buildings or other structures (which may include equipment, furniture, fittings and articles associated with or connected with such a group of buildings or other structures) and,*
in relation to the conservation or improvement of a place, includes the immediate surroundings of the place;

This may be compared with articles 1 and 2 of the World Heritage Convention. The definitions are very similar.

In addition to this evidence of a relationship between Australia's National Estate and the implementation of the World Heritage Convention in Australia, it is interesting to note that the Federal Government relies substantially upon the report and recommendations of the Commission when considering the merits or otherwise of nominating an area within Australia for World Heritage listing.

*On the face of it, there is little direct connection between the Register of the National Estate and the World Heritage List; the latter being a special category of protected area under IUCN's international classification system (CNPPA (1984)). The Register of the National Estate involved national significance, while the World Heritage list identified outstanding universal value, meaning the rare, unique or specially representative. Yet a conjunction does exist, albeit implicitly. It is almost inevitable that in cataloguing places of national value, a few prime areas prospectively of world comparative quality may be identified. Furthermore, the comprehensive studies carried out for National Estate listing, sometimes reveal hitherto unsuspected qualities or confirm earlier evidence that some places possess scientific or other values that elevate it to world class, irrespective of whether scenically attractive or not. In brief, politicians and administrators may find themselves drawn into World Heritage issues, indirectly through the Register of the National Estate and related complex technical criteria.*⁸

The link between the National Estate and World Heritage is real. In assessing areas of Australia for National Estate values, it is inevitable that world heritage values will also be considered. The practical implications of this relationship are discussed in detail below.

The functions of the Commission, which demonstrate the broad ranging 'interest' of the Commission, an interest that necessarily includes matters of World Heritage, are as follows:

- a) to furnish advice to the Minister, either of its own motion or upon request made to it by the Minister, on matters relating to the National Estate, including advice relating to action to conserve, improve and present the National Estate;*
- b) to encourage public interest in, and understanding of, issues relevant to the National Estate;*
- c) to identify places included in the National Estate and to prepare a register of those places in accordance with Part IV;*
- d) to furnish advice and reports in accordance with Part V;*

⁸ Bruce Davis, 'Federal-State Tensions in Australian Environmental Management: The World Heritage Issue', Murdoch University, Environment and Planning Law Journal June 1989, page 69.

- e) to further training and education in fields related to the conservation, improvement and presentation of the National Estate;*
- f) to make arrangements for the administration and control of places included in the National Estate that are given or bequeathed to the Commission; and*
- g) to organize and engage in research and investigation necessary for the performance of its other functions.⁹*

The methodology for identifying places included in the National Estate is not established in the Heritage Act, nor are there compensation provisions for a detrimental economic impact resulting from listing. The functions of the Commission are very wide ranging. The role of the Commission in providing education and information for the public is extensive. The amount of financial support would be the only limit to the Commission's activities in this regard. The Commission's function to identify areas of National Estate and to prepare a register means that ongoing assessments are essential. The employment of the appropriate experts in each area assessed would also seem essential. All the above necessarily involves some overlap and probably conflict with the land management agencies in each state and territory. The Act does not refer to the importance of liaising closely with the relevant state and territory agencies, apart from consulting as it sees appropriate. The Federal Government's legislative action in this area of management, traditionally undertaken by state and territory governments, has caused concern and conflict.

HERITAGE CRITERIA AND ASSESSMENT

As an example of the concern and conflict referred to above, there is a widespread fear and dissatisfaction with the assessment process undertaken by the Commission:

⁹ Clause 7, Australian Heritage Commission Act 1975.

Nearly all submissions reflected support for the concept of World Heritage and National Estate, but expressed deep concern with the listing processes that have occurred in Tasmania over the last decade. The Committee believes there is a clear and demonstrated need for improvements to the processes as expressed by industry, government agencies, land owners, local government, professional and community interest groups and individuals. ¹⁰

The Commission pursues an internal assessment process relying on 'expert' evaluation. This assessment is carried out with reference to criteria developed by the Commission, though not specified in the Heritage Act. Criteria for a 'place' on the National Estate include its:

- A. importance in the course, or pattern, of Australia's natural or cultural history;*
- B. possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;*
- C. potential to yield information that will contribute to an understanding of Australia's natural or cultural history;*
- D. importance in demonstrating the principal characteristics of :*
 - 1. a class of Australia's natural or cultural places; or;*
 - 2. a class of Australia's natural or cultural environments;*
- E. importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;*
- F. importance in demonstrating a high degree of creative or technical achievement at a particular period;*
- G. strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;*

¹⁰Tasmanian Legislative Council Land Use Committee, "A National Challenge to Correct the Misunderstandings of the National Estate and World Heritage Values" (No. 6), 20 November 1991.

H. *special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history.*' ¹¹

Again, the criteria leaves the in-house assessor with a wide scope and broad licence upon which to then make the judgment. The probability of conflict with the conservation assessment processes of the government of a state or territory appears to be quite high.

It is interesting that during the debate on the Australian Heritage Commission Act Amendment Bill in 1976 the then Prime Minister, the Rt. Hon. Malcolm Fraser, said: 'As its first task, the Commission will proceed urgently with the preparation of the register of the National Estate so that priorities can be examined on a factual and systematic basis, and not piecemeal.' ¹²

If a favourable assessment is granted, the Commission publishes its intention to add the item to its Register. This is followed by a three month period for the reception of comments or objections from the public. During this period, the area remains on an 'Interim List', pursuant to section 26 of the Heritage Act, which indicates it is under consideration for the Register. In this regard, it is difficult to understand why the World Heritage listing procedures are so distinctly different, and, for areas of 'world' heritage rather than 'national' heritage, why they are so distinctly less stringent, ie : there is no specifically designated time for public comment or objection and Australia's obligation to provide an interim list with respect to 'world' heritage has until recently not been acted upon. ¹³

The Commission has subsequently developed its own internal assessment procedure. In regard to assessment procedures for National Estate, the Commission prepared Guidelines for Research Officers as follows:

¹¹ Australian Heritage Commission, Guidelines, 1990.

¹² House of Representatives Hansard, page 3066, 4 June 1976.

¹³ Australia has failed to fulfil article 11(1) of the Convention relating to the provision of an interim list. Only recently has Australia apparently undertaken to provide this list (source: Author's contact with Federal Department of the Environment, Sport and Territories).

The Australian Heritage Commission employs, on contract, Research Officers to assist in the process of assessing natural environment places for the Register of the National Estate. The contracts are entered into with tertiary institutions or voluntary conservation organisations and it generally engages research officers on a part-time basis.

*Research Officers should not adopt the role of an advocate for any nomination. However, the Research Officer should ensure that all relevant information is available to panel members.*¹⁴

The role of the Research Officer is thus a very broad one. The guidelines of assessment are clearly not rigorous and allow for a selective and arbitrary analysis. Even the Chairman of the Commission has referred to the deficiency in the Act in this regard.

The underlying principle of the Australian Heritage Commission Act is that places of National Estate significance are identified in advance of proposals affecting them ...

*The present Act does not establish how places will be identified or evaluated for inclusion in the Register ... The Act has been criticised for this deficiency.*¹⁵

In addition, the Heritage Act does not require the Interim List to be available for public inspection, a factor contributing to long standing anxieties about the lack of 'transparency' in Commission procedures. This approach is certainly difficult to reconcile with the prevailing emphasis on freedom of information in both the private and public sectors.

If objections are received, the property is reconsidered by the Commission and a decision is made whether to register. A decision to register is gazetted and published. A decision not to register results in removal of the property from the Interim List.

While the Commonwealth Department of the Environment, Sport and Territories provides administrative support for the Commission, the Commission's operations

¹⁴ Guidelines for Australian Heritage Commission Research Officers, January 1990, page 1.

¹⁵ P Galvin, Chairman, Australian Heritage Commission: recent developments, Australian Heritage Commission, 1990, page 10.

are largely autonomous. A decision to list is entirely at the discretion of the Commission, except in atypical instances where the Minister is responding to a specially requested Environmental Study, in which case he or she is given authority to approve or refuse a listing. A comparison of the National Estate and World Heritage listing procedures is set out in the appendix to this thesis.

Finally, neither the Heritage Act nor the World Heritage legislation¹⁶ establishes the framework or methodology for managing the registered or interim-registered areas for protection and conservation. This role, with respect to National Estate areas, has become a responsibility, at least in part, of the Commission and ultimately the Commonwealth Government.¹⁷

CONSULTATION WITH THE AUSTRALIAN HERITAGE COMMISSION

Section 8 of the Heritage Act outlines the Commission's consultation procedures :

The Commission shall, in the performance of its functions in relation to any matter, and so far as it considers it appropriate to the nature of the matter, consult with Departments and authorities of the States, local government authorities and community and other organisations.

The discretion to consult is left entirely to the Commission, with the exception of matters affecting national parks or reserves made pursuant to the National Parks and Wildlife Act 1975.¹⁸ It is noteworthy that there is no requirement to consult with, let alone receive the consent of, affected state governments or local authorities, and no mention whatever is made of landowners, or those with other interests in land, such as lessees and licensees.¹⁹ The economic, social, cultural and community interests of a range of people may be affected by National Estate

¹⁶ World Heritage Properties Conservation Act 1983.

¹⁷ See details below including section 30, Australian Heritage Commission Act 1975.

¹⁸ Section 8, Australian Heritage Commission Act 1975.

¹⁹ See also Craig, "Citizen Participation in Australian Environmental Decisions" (1986) 2 Northwest Environmental Journal, 115.

listing and management ²⁰ but there is no legislative obligation to consider their interests. Neither is there any provision for compensation for reduced property values or a detriment to property rights as a result of National Estate listing. For example, obtaining mortgage finance may not be as easy following such a listing (farmers in the Willandra lakes region have experienced this difficulty).

State Governments are often informed of a proposed registration, and may take it upon themselves to inform local authorities who may consult landowners, lessees and licensees. This practice has occurred purely as a matter of courtesy, and future Commission administrators would be at liberty to dispense with it altogether. Throughout the 1980's the Commission had a practice of not advising the owner of registration of the relevant property. This has been a major cause of anxiety and, it is submitted, a threat to their civil liberties. Is it fair and reasonable to list private property without firstly their consent, and secondly, notifying them of such a listing? Amendments to the Heritage Act in the early 1990's ²¹ imposed on the Commission a requirement to notify the owner.

Similar problems are associated with those with private property rights in World Heritage areas. Under the World Heritage nomination, listing and management regime, there is no legislative requirement to seek the consent of owners or even notify owners of the nomination and listing. Nor is there a requirement for those with proprietorial rights to be involved in developing an appropriate management regime. In fact, the only legislative requirement is to inform the property owner if the Commonwealth Government intends to compulsorily acquire the land.

THE NATIONAL ESTATE – A NEW SYSTEM OF NATIONAL PARKS?

The following discussion is an attempt to place the National Estate regime and the politicising of this concept into perspective.

²⁰ The Resource Assessment Commission in its Forests and Timber Inquiry July 1991 stated: 'Approximately four per cent of Australia's land surface has been included in 713 places in the Register of the National Estate that contain forests. Of these National Estate places, approximately half (43 per cent) the total area is forests, with about half (53 per cent) of that forested area being in conservation reserves', at page L15.

²¹ Australian Heritage Commission Amendment Act 1990 passed in late 1990.

*The reality is that in the community's view, National Estate equals National Park. Politicians won't make decisions and very little is being done by the Heritage Commission to remedy the situation.*²²

Australia's National Parks have been developed to identify and manage areas of natural and recreational importance, the untrammelled preservation of which is accepted as being of such importance that rarely is another land use entertained.

The selection criteria for national parks and state reserves in most Australian states correspond in general with the criteria used by the Commission to identify the National Estate, and the two classifications do, in practice, frequently overlap. Indeed, it would be unusual for a national park not to have already obtained National Estate status. The question therefore arises, what is the benefit of an additional natural heritage classification? The answer to this question lies in the inevitable diversity of physical contexts in which the National Estate may be identified and in addition the overlapping role of the Commonwealth Government in determining National Estate areas.

There are many instances in which precious heritage values exist in the midst of otherwise ordinary natural settings, and it is of the utmost importance that a classification exists which is capable of separating heritage values from commercial or recreational values, and protecting the former without negating the latter. The National Estate classification is designed for the purpose of allowing multiple uses. The extent to which this can occur depends on whether there has been a clear delineation of the different values in the National Estate areas. This process is, however, difficult to institute and National Estate areas from the public's viewpoint inevitably become likened to National Parks or simply no-go areas, ie: single-use rather than multiple use. This same analogy applies to World Heritage areas. Similar concerns about the detrimental impact of National Estate listing on competing values can be applied with respect to world heritage classifications.

The clamour by the green movement for '...an end to logging in National Estate forests' (not to mention World Heritage areas) therefore reveals an understandable,

²² Dickenson, Ian, Tasmanians and the National Estate, Conference on The National Estate, Hobart, 29 August 1991, page 2.

but nonetheless erroneous, conception of what the classification is all about. Its very reason for existence dictates that rational discussion can only be conducted by considering whether particular heritage values, in a particular region, are compatible with particular land uses. The breadth of interests that may be protected under the Heritage Act criteria makes it a nonsense to discuss 'National Estate forests' generically, as if they can all be lumped together in some homogeneous grouping for every planning purpose.

The criteria relevant to properties in the 'natural environment' contain the following:

- 1) A representative list of those places which demonstrate the main stages and processes of Australia's geological and biological history;*
- 2) Rare or outstanding natural phenomena, formations and features including landscapes and seascapes;*
- 3) Habitats of endangered species of plants and animals;*
- 4) Wilderness forests and selected habitats and phenomena which, being readily accessible to populated areas, are as valuable as the rarer but less accessible places in the same categories.* ²³

The classification is designed, amongst other things, to alert government policy makers to the presence of non-commercial values that should be investigated and understood before an informed land-use decision can be made. As the Commission itself is at pains to point out, 'We are not a land-use body. We are a technical/scientific agency giving expert heritage advice to government decision-makers. They are the ones who must make the land-use decisions.'²⁴

The Tasmanian Parliamentary Accord (commonly referred to as the Green/Labor Accord) dated 31 May 1989, included provisions significantly affecting the future use of National Estate areas in Tasmania. Clause 14 provides, *inter alia*, 'The Independents will continue to work for the complete protection of Tasmania's National Estate areas.' Clause 15 provides 'Any National Estate Areas which the review identifies as not essential to the logging industry will be protected as

²³ Australian Heritage Commission Guidelines, 1990.

²⁴ Don't Shoot the Messenger, letter to the Editor, *The Mercury*, 24 January 1990.

national parks'. Both clauses had a direct and lasting impact on the resource based industries. Both clauses demonstrate a fundamental misunderstanding of the reason for National Estate areas and the latter clause discriminates against mining and other productive industries, other than forestry. It demonstrates antagonism to the concept of multiple use. If the classification system is not more rigorously reviewed, the probability of conflict between the Federal and State land management authorities can only increase.

Unlike a World Heritage nomination, which must be made by the Commonwealth Government, any individual or group can submit a nomination for an area of land to be classified as part of the National Estate to the Commission. Furthermore, the Heritage Act does not require the identity of the nominator to be disclosed.

The absence of any source-selectivity, and the encouragement of anonymous nominations is particularly worrying when it is considered that the Commission traditionally has accepted three out of every four nominations it has received. This amounted to about 9,000 heritage items, and a backlog of 3,480 awaiting consideration of 'national significance'.²⁵ Because of this 'swamping', the very concept of the National Estate as something special of which all Australians should be proud, is in danger of serious dilution. It is relevant to note comments by the Resource Assessment Commission regarding the Heritage Commission's practice of ignoring certain objections, as follows : 'It has been Commission practice to dismiss objections that ignore the intent of the Australian Heritage Commission Act and raise questions of ownership, or economic or resource considerations.'²⁶

It is clear that the sole consideration for the Commission is the heritage value of the item or area and that other concerns are not considered.²⁷ In essence, a broader concern for the public interest is outside the scope of the Commission and therefore neglected. Of course this is no fault of the Commission directly but rather the promulgators of the legislation, the Commonwealth Parliament, must stand accountable for this neglect.

²⁵ RAC, Forest and Timber Inquiry Draft Report Volume 2, January 1990.

²⁶ RAC, Forest and Timber Inquiry Draft Report Volume 2, July 1991, page L7.

²⁷ See also Boer, B, "Natural Resources and the National Estate" (1989) 6 Environmental and Planning Law Journal, 134.

The precise meaning of the word 'National' in National Estate has been a subject of consideration in past reviews of the role of the Australian Heritage Commission. Whilst it is difficult to draw fine distinctions, the Commonwealth's legislative function can only be used to record those articles of truly national significance. The Register has been compiled in the absence of state and local registers of their respective natural and cultural heritages, and the Commission has attempted to prepare a comprehensive inventory, within the means of its resources. The problem is particularly acute in Tasmania where the number of areas nominated, interim listed or registered is escalating without apparent limit. These areas (nominated, interim listed or listed) account for over 2.5 million hectares or more than 37% of Tasmania as at January 1990. Resource based industry groups have been particularly critical.

Since the Australian Heritage Commission Act was introduced in 1975, 37% of Tasmania, or 60% of all Crown Land in Tasmania, has been nominated, interim listed or registered on the National Estate. (page 4)

14% of all National Estate listings in Australia are in Tasmania and yet we constitute only 3% of the population. (page 2)

Several fundamental deficiencies in the concept and application of National Estate contribute to this negative impact.

Firstly, the eight listing criteria and the 14 sub-criteria are so broad that almost anything can be successfully nominated and listed. (page 3)

The nomination, evaluation and listing processes are widely criticised by industry and many in the community. Nominees remain anonymous, objections can only address nomination criteria, nominations are assessed solely on the basis of National Estate values. (page 4) ²⁸

The concept of a National Estate should receive broad community support. However, with such a wide range of criticisms from different resource based, community and business groups, this has become difficult. Reform of the

²⁸ Groeneveld, Oscar, Natural Resource Industries and the National Estate in Tasmania, Hobart 29 August 1991.

assessment processes, with a recognition of the various interest groups, is necessary to gain the confidence of the general public.

THE COMMONWEALTH GOVERNMENT ROLE

The Commonwealth Government developed the legislative and administrative framework for both National Estate and World Heritage nomination, listing and management and must accept responsibility for its impact on the competing economic, social and cultural values.²⁹ The following statement by a Tasmanian Legislative Council Select Committee is representative of concerns throughout many sectors of the community.

*About 20% of Tasmania is currently recognised as World Heritage. About 35% is listed as National Estate. The use and management of land and its resources in both these categories is considerably restricted. In particular the Commonwealth Government has a major influence on development decisions ... The report argues that whilst there has been positive input on the environment, such actions have had a negative impact on the economy and, further, have caused divisions in the community.*³⁰

The Heritage Act has both a direct and indirect effect on the Commonwealth Government and its activities. It also affects those with a competing interest in the subject. Certainly, in some cases the effect has been negative.

Once an area is registered, every Commonwealth Minister is bound, under section 30 of the Act not to:

...take any action that adversely affects, as part of the National Estate, a place that is in the Register, unless he is satisfied that there is no feasible and prudent alternative... and that all measures that can reasonably be taken to minimise the adverse effect will be taken...

The Resource Assessment Commission said the following about section 30 and the views of the Commission during its Forests and Timber Inquiry:

²⁹ See also Boer, B, "Review of the Commonwealth's Role in the Conservation of the National Estate" (1986) 3 Environmental and Planning Law Journal, 83.

³⁰ Legislative Council Land Use Committee, A National Challenge to Correct the Misunderstandings of the National Estate and World Heritage Values (No. 6), 20 November 1991, page 5.

In its submission to this Inquiry the Australian Heritage Commission identified the following Commonwealth actions potentially affected by Section 30 of the Act:

- . acquisition, disposal, or management of Commonwealth property;*
- . Commonwealth works and construction, for example Telecom towers;*
- . Commonwealth activities, for example defence manoeuvres;*
- . Commonwealth specific purpose grants, for example highways, flood mitigation;*
- . Commonwealth permits, for example foreign investment, export licences.³¹*

But that submission does not fairly represent the full impact of the listing of an area of National Estate. Section 30 has an impact on the Commonwealth Government but it can correspondingly have an impact on those in industry and the community in general. (The final dot point above is a good example in this regard.)

The Resource Assessment Commission referred to the submission by the National Association of Forest Industries. This is instructive with respect to the impact of a listing on industry. The National Association of Forest Industries submission stated:

Once an area is entered on the Register of the National Estate, continued access to the resource by industry is placed increasingly at risk.³²

The Victorian Government submission to the RAC proposed similar arguments, as follows:

Problems arise when the Register is extended into areas for which it was not intended, namely as a land-use planning mechanism.

³¹ RAC, Forest and Timber Inquiry Draft Report Volume 2, July 1991, page L8.

³² Ibid., page L9.

The Australian Heritage Commission ... has no explicit role in land use decision making. However, the public does not generally recognise the distinction between National Estate and National Parks, and National Estate listing has been used to provoke intense political pressure on state government decision making. ³³

Section 30 of the Heritage Act clearly has the potential to activate Federal Government powers over interstate and international trade (particularly the power to grant export licences), the operation of companies and the aboriginal community. The prospect of further Commonwealth encroachment on these areas of traditional State responsibility can only serve to further impact upon the Federal/State balance in favour of the Commonwealth Government. In addition, it undermines relations between the State and Commonwealth Governments and reduces investor confidence.

The obligations of the Commonwealth Government to protect places on the register of the National Estate has also impacted on Tasmania in other ways. The Tasmanian Chamber of Mines and the Tasmanian Chamber of Commerce both presented evidence to the Committee that National Estate listing was a disincentive to the development of resources in Tasmania, be it forestry, mining, water or land. This was especially the case where Commonwealth approval was required, for example for the export of minerals. ³⁴

Furthermore, by obfuscating the responsibility of both Commonwealth and State Governments to protect the economic, social and cultural interests of those affected, the result can only be a reduction in the accountability of both.

The analogies drawn between National Estate listing with World Heritage listing in Australia is important with respect to an understanding of the legal and administrative framework, but also with regard to the politicisation of heritage and conservation issues.

³³ Ibid., page L10.

³⁴ Legislative Council Land Use Committee, A National Challenge to Correct the Misunderstanding of the National Estate and World Heritage Values (No. 6), 20 November 1991, page 23.

DE FACTO LAND USE DECISION MAKING

The community, understandably, finds it difficult to distinguish between National Estate and National Park. This lack of understanding has been highlighted as follows:

*National Estate is not a land use decision as no values other than National Estate criteria are examined. There is a need to educate the community to the fact that National Estate and National Park are indeed different and that resource development may not be detrimental to National Estate values. Until this happens or the process of entering places on the register is substantially changed, the National Estate will continue to be a term associated with divisive land use disputes.*³⁵

The Legislative Council Select Committee alleged that the conservation lobby were instrumental in perpetrating the misunderstanding.

*The environmental movement has been particularly successful in portraying those National Estate areas not already in a National Park or World Heritage area, as the National Parks of the future that must be preserved.*³⁶

The absence of mandatory consultation with affected or potentially affected bodies and individuals is based on the false premise that Commission decisions are not land-use decisions. The argument is that land-use decisions rest with Ministers and Government Departments, so the Commission should not be encumbered with additional procedural safeguards relating to the economic, social, cultural and community interests of the public.

An analysis of the legislative and administrative frame-work with respect to the purpose, power, role, function and responsibility of the Commission might go some distance towards supporting this approach and therefore a non-confrontational outcome. However, a more rigorous assessment of the role that National Estate listings play in the wider political process and the total land-use debate, will produce a quite different view. Confrontation and divisiveness is the real world in which National Estate listings take place.

³⁵ Ibid., page 24.

³⁶ Ibid., page 25.

This latter view is based on the following premises:

1. In the eyes of the community the function of the Commission is difficult to distinguish from that of the World Heritage Committee and, more particularly, the various National Parks and Wildlife Services in each state and territory.
2. The resulting confusion has made decisions to place a piece of land on the Register vulnerable to misconstruction by the community as a decision to seal off an area from productive and many recreational land uses.
3. The misunderstanding held at a community level has been effectively perpetuated by elements of the conservation lobby. This has been done to foster the perception in the mind of the public that National Estate status is akin to national park or state reserve status. Accordingly, the response from industry and some community groups has been vehement.

For example, industry groups would insist that the public ignorance and confusion has been exploited by the conservation lobby for its own political objectives.

Current Commission procedures represent de facto and inadequate land use decisions which are skilfully employed by anti-development groups to create community confusion and division and promote high sovereign risk and investor uncertainty. ³⁷

In regard to the nomination and listing of National Estate areas, such a perspective is difficult to deny. It is submitted that the *bona fide* heritage concerns that inspired the Heritage Act have been subsumed under a quite different agenda and the Commission itself has tended to become a pawn in a much larger political contest.

PROPOSED LEGISLATIVE REFORM

There has been much confusion in the mind of the public and of politicians as to the purpose of the Commission, and, in particular, its Register of the National Estate.

³⁷ Groeneveld, Oscar, Natural Resource Industries and the National Estate in Tasmania. Conference on the National Estate, Hobart, 29 August 1991.

The Committee argues that there is a significant misunderstanding of those terms amongst the community. This Report attempts to clarify the meanings. It also concludes that some sections of the community have cultivated this misunderstanding to enhance their agenda for additional National Parks.

The Committee has identified a significant level of concern with the various methods adopted in the past to create World Heritage and National Estate areas in Tasmania. It believes there is a clear and demonstrated need to improve those processes in the future.

*There will be demands by some sections of the community for additional areas to be registered. A process must be found to deal with those areas in a manner which allows consideration of all values and uses of the land in an open and transparent process.*³⁸

The concept of the National Estate, and the functioning of the Commission, are important strands in the complex tapestry of the environment/development debate. There is clearly a need for a system to be instituted which will assess the competing interests and not solely the conservation values of an area. The forest products industries of Australia have become severely and adversely affected by the politicisation of the National Estate concept over the past two decades. Only recently has there been an alleviation of this effect (pursuant to efforts to introduce principles of resource security by legislative means). However, even in late 1991, during vociferous public debate relating to the merits of resource security, the mining industry had this to say:

Despite Australian Heritage Commission denials to the contrary, National Estate listing of large areas does constitute land-use decisions and these decisions do impact on the subsequent management and investment regimes in those areas.

For example:

- Several clauses of the Labor/Green Accord in Tasmania closely linked forestry operations with National Estate areas;*
- The first pre-requisite of the Combined Environment Groups, involving themselves in the government sponsored mining industry forum, was an immediate moratorium on exploration and mining in National Estate areas.*

³⁸ Legislative Council Land Use Committee, A National Challenge to Correct the Misunderstanding of the National Estate and World Heritage Values (No. 6), 20 November 1991, page 5.

- . *Any exploration licence granted in a National Estate area has special restrictive conditions placed upon it by the State Government.*
- . *Any new forestry or exploration or mining activities in National Estate areas are publicly objected to on the basis that they are in a National Estate area.*

All of these situations represent de facto land use interpretations being placed on National Estate areas. ³⁹

There seems little doubt that the act of registering an area for the National Estate undoubtedly has land use planning and management implications. Responding to and addressing these (perhaps) unforeseen consequences would be a helpful initiative to de-politicise the process.

The Commission should fulfill the important role of identifying and acquainting the people of Australia with their cultural and natural heritage, but ensure also that its role is properly understood in the context of the total land use and management procedures, ie: explain that the Commission's role is to consider and assess only one of the competing interests in any potential National Estate area, being the conservation values of the area. The Commission's role and functions are broad in scope. ⁴⁰

It appears that the fundamental problem to be resolved is the assessment process and the limited factors available to the Commission for consideration.

³⁹ Groeneveld, Oscar, *Natural Resource Industries and the National Estate in Tasmania*. Conference on the National Estate, Hobart, 29 August 1991, pages 4 and 5.

⁴⁰ The Australian Heritage Commission Act 1975 provided for the establishment of a Federal statutory authority, charged with advising the relevant Minister for Environment about conservation of the built, natural and cultural environment of Australia and associated territories, fostering public education about such matters and compiling an inventory of places of national significance, designated the Register of the National Estate (Yencken 1981).¹ Bruce Davis, *Federal-State Tensions in Australian Environmental Management: The World Heritage Issue*, *Environment and Planning Law Journal*, June 1989, page 67.

The fact that the Australian Heritage Commission is required to consider only heritage values is the underlying assumption necessary to the background of conflict and controversy in National Estate Listings. Because it is the only value considered, it is assumed that all other economic, social, cultural and community concerns will be taken into account at a subsequent time. The lack of a simultaneous assessment of all these concerns provides a firm foundation for ongoing conflict of the land use and land management. ⁴¹

The land use and land management assessment procedures are currently inadequate in that they provide only for assessment of heritage values. It is understandable that the politicised state of affairs has generated a steadily increasing discontent in certain sections of the community which found expression, in June 1985, in the request by the then Commonwealth Minister for Arts, Heritage and the Environment, the Hon Barry Cohen, MP, for an internal review of the legislative and administrative arrangements governing the operation of the Commission.

That request resulted in the 'Report of the Review of the Commonwealth Government's Role in the Conservation of the National Estate', published in August 1986. The review attracted over 150 submissions, reflecting the strength of feeling in the community over the issues involved. It must be borne in mind, however, that although taking public submissions, the review was conducted 'in-house'. While internal review is often a helpful and necessary process, the fact remains that the Commission is hearing evidence and then sitting in judgment on its own operations.

Although the bulk of the criticisms contained in the submissions were rejected, a number of recommendations were made to the Minister. Those which were accepted were incorporated in an Australian Heritage Commission Amendment Bill which was passed in late 1990.

A number of the specific recommendations incorporated in the amending Bill are relevant. They:

- clarified the definition of the 'National Estate';

⁴¹ Ibid., page 69.

- . limited places that can be included in the Interim List to those that have been included in a Notice of Intention to Register by the Commission;
- . required mandatory notice, to property owners and relevant local authorities, of the Commission's proposal to register places prior to publication of such proposals and provisions for more adequate area identification in public notices;
- . allowed the Minister to appoint independent assessors to advise the Commission in its consideration of objections to the proposed entry of a place in the Register; and
- . empowered the Minister to direct the Commission to review the continued entry of a place in the Register.

It should be noted that, despite those amendments, there remains very substantial concern with National Estate matters. Some of these concerns were expressed by the Resource Assessment Commission in its July 1991 draft report:

Concerns should be grouped into three broad categories:

- . *a lack of public understanding about the difference between the National Estate and national parks;*
- . *that National Estate listing affected resource security and hence investment levels in the timber industry;*
- . *the adequacy of the Australian Heritage Commission's procedures.*⁴²

Even in November 1991, a Tasmanian Legislative Council Select Committee had these things to say:

It was not until the early 1980s that the misuse and wider implications to the State of the National Estate became apparent ...

*Areas were entered on the register with apparently only cursory examination of the values and of appropriate boundaries.*⁴³

⁴² RAC, Forest and Timber Inquiry Draft Report, Volume 2, July 1991, page L18.

⁴³ Legislative Council Land Use Committee, A National Challenge to Correct the Misunderstanding of the National Estate and World Heritage Values (No. 6), 20 November 1991, page 22.

The Legislative Council Committee was strident in its assessment that the land use planning processes were inadequate and in need of reform. The fact that the listing and management of National Estate areas has become embroiled in political jostling now seems unquestionable.

Protection of National Estate forests was a primary objective of the environmental movement in the Helsham inquiry, the Salamanca Process and the Forests and Forest Industry Strategy process. It was also a major component of the 1989 Tasmanian Parliamentary Accord. Although those processes were not directly a result of the National Estate they illustrate the level to which the register of the National Estate has come to influence political processes at all levels of government in Tasmania. ⁴⁴

Even the motives of the Commission have been questioned due to the lack of distancing itself from the political infighting.

The Committee identified a misunderstanding within the community of the meaning of National Estate. This is not surprising given the deliberate control by the environmental movement of National Estate as land which should be National Park ... The Committee note that the AHC has in the past produced material which only assists this misconception. ⁴⁵

There is indeed room for further legislative reform. The Commission or another independent authority should be given the task of assessing the competing values and of educating the public on the differences between National Estate and National Parks. This would go one step towards de-politicising the National Estate listing and management processes.

CONCLUSION

The National Estate assessment processes have evolved since the Hope Commission and the passing of the Heritage Act. The Heritage Act has established a legal and administrative framework in which Australia's National Estate heritage has been identified and conserved. However, together with this framework has

⁴⁴ Ibid., page 23.

⁴⁵ Ibid., page 24.

grown the reality of political division and community fear with respect to the rights and privileges that have historically remained with those who have an economic, social, cultural or community interest in the National Estate, or in areas adjacent to or near the National Estate.

Although property rights are not inviolate, they deserve more respect and care than is demonstrated by the workings of the National Estate regime. The World Heritage legislative, administrative and management procedures have unfortunately been established on this very shaky foundation.

Areas in Australia listed for World Heritage will almost certainly be listed on the National Estate, and so to this extent at the very least there is an overlap in the identification, listing and management of these two areas.

Chapter 4

THE CONSTITUTIONAL FRAMEWORK

INTRODUCTION

How does one 'measure' the power the Commonwealth Government has with respect to the nomination, listing and management of World Heritage areas? The answer to this question relates very directly to the extent of the Commonwealth Government's power with respect to the environment and natural resources. The measure of this power is dynamic, not static – changing as each year passes.

The Constitution is the source of authority for both the State and Commonwealth Governments. It is a dynamic 'living' document, written to enable change in its interpretation without requiring an amendment to its words. The federal balance has moved, since the Engineers Case ¹, in favour of the growing powers of a centralist government. This movement in favour of the Commonwealth has become even more evident since the landmark decision in the Tasmanian Dams case. ²

Nevertheless, despite the shift in the balance in favour of the Commonwealth, there are three reasons why the states remain dominant with respect to the management of land. The first is that the Crown in right of the state or the state government is the most substantial landowner in every state and the state is the ultimate owner of all land – most land having been vested in the Crown upon white settlement. In regard to this latter view, however, the High Court decision in Mabo ³ and the subsequent Federal Government legislation ⁴ has restricted the full implementation of this traditionally accepted common-law precedent. In the Mabo decision, the High Court held 'where a clan or group has continued to acknowledge the law and (so far as practicable) to observe the customs based on the traditions of that clan or

¹ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129. The High Court rejected the doctrine that the constitution actually 'reserved' powers for the States.

² *Commonwealth v Tasmania* (1983) 158 CLR 1 or (1983) 46 ALR 625.

³ *Mabo and others v State of Queensland* (1992) 107 ALR 1.

⁴ Native Title Act 1993.

group, whereby that traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence' ⁵ But the High Court did confirm that where that traditional native title had expired, then the Crown's title would exist. ⁶

Notwithstanding the very significant change in our understanding of the concept of ownership of land in Australia, there remains strong support for the view 'The substantial degree of State Government ownership and control of natural resources within their boundaries points inevitably to state involvement'. ⁷

The second relates to the power granted to the States at the time of federation. It included power to legislate with respect to almost any matter within their territory.

... the range of instruments available to the States for the management of natural resources is much more extensive than that available to the Commonwealth. Fraser Island and the Tasmanian Dam show the effectiveness of Commonwealth involvement when development is stopped. Those incidents, however, do not demonstrate the capacity of the Commonwealth to manage development. Prohibition and taxation are crude instruments for that purpose.

The States, in contrast, have both the incentive and the opportunity to design tenure arrangements for government resources which do integrate conservation and development. ⁸

Thirdly, of the specific powers granted to the Commonwealth at federation, none related to the environment. ⁹

The Commonwealth Government's power over the environment, and therefore World Heritage, is necessarily derived from various paragraphs of section 51 and various other sections of the Constitution. ¹⁰ The authority not specifically

⁵ Mabo and others v State of Queensland (1992) 107 ALR 1, page 2 (summary).

⁶ *ibid.*, page 2.

⁷ Michael Crommelin, Commonwealth Involvement in Environmental Policy : Past, Present and Future, April 1987, at pages 20 and 21.

⁸ *ibid.*, page 21.

⁹ John Bradsen, Australia's Constitution – Land and Vegetation and the Environment. The Constitution and the Environment, Centre for Comparative Constitutional Studies, 1991, page 30 at page 36.

¹⁰ See Bates, G M, Environmental Law in Australia 3rd ed. Sydney, Butterworth (1992).

referred to in section 51 rests with the state governments and is known as the residual powers.

It is submitted that the Commonwealth Government has more than adequate powers with respect to nominating, listing and management of World Heritage Areas (primarily pursuant to section 51(xxix) and its powers under the World Heritage Convention), but exactly what is the scope of this power – how far does it extend? Conversely, what role do the states have with respect to World Heritage?

The following discusses the various paragraphs of Section 51 and other sections of the Constitution relating to Commonwealth Government power over the environment, and reviews the federal/state balance, particularly with respect to World Heritage. The chapter concludes that the powers vested in the Commonwealth have increased markedly in the past decade primarily through the High Court's broad and liberal interpretation of the Commonwealth's powers.

THE FEDERAL STATE BALANCE

The shift in the federal/state balance with respect to the environment, and World Heritage in particular, can occur in four ways.

The first way is by a referral of power from the states to the Commonwealth pursuant to section 51 (xxxvii) of the Constitution. This is highly unlikely and politically unfeasible at this time. The state(s) would require a major trade-off to give up such a broad head of power as the environment.

The second way is via a referendum pursuant to section 128 of the Constitution. A majority of electors in a majority of the states is required for the referendum to succeed.

Despite a previous Commonwealth Minister for the Environment, the Hon. Ros Kelly, publicly stating that a referendum should be held to grant the Commonwealth power over the environment,¹¹ it is highly unlikely that one would be successful for several reasons. The first reason is that during the difficult economic

¹¹ 'Kelly warns states on environment', Adelaide Advertiser 5 May 1990.

circumstances facing the country, the priority placed on this issue is not what it was a decade ago. The second reason is that the 'environment' can be broadly defined and, accordingly, it would be extremely difficult to find a suitable form of words that would accurately reflect the power that was being bestowed upon the Commonwealth.¹² The third reason is that the traditional experience of opposition by the states and the certain public campaigns by the various state governments wishing to protect their sovereignty and rights would count against a referendum. The final reason is that any referendum would be likely to fail because past experience says that it will. Even with the support of the major political parties¹³ a referendum is unlikely to succeed without state government support.¹⁴ The Commonwealth Government gave consideration to the merits of a referendum during 1989 but rejected, or at least deferred, the proposal.¹⁵

The third way to facilitate a shift in the balance is through 'co-operation' with the states. A concept known as co-operative federalism has arisen in the past decade. The Intergovernmental Agreement on the Environment would be an example of this concept.¹⁶ This Agreement establishes principles under which the signatory parties agree to manage their affairs and conduct their relationships with each other. The Intergovernmental Agreement on the Environment was signed in February 1992. Mrs Kelly, then Federal Minister for the Environment, said: 'The Agreement sets out the roles of each sphere of government with the aim of reducing inter-

¹² Co-operation is unlikely to yield satisfactory results on difficult and sensitive issues of this kind unless mechanisms with a fair degree of sophistication are put in place. *Intergovernmental Arrangements: Legal and Constitutional Framework*, by C Saunders, September 1989, pages 20 and 21.

¹³ The Prime Minister, Hon R.J. Hawke:-

'If and when that awareness has reached a sufficiently high level, the Government would consider proceeding with a referendum addressing the Constitutional powers of the Commonwealth over the environment. The Government naturally would prefer to go to the people with bi-partisan support.' 'Towards a Closer Partnership', National Press Club, 19 July 1990.

¹⁴ Two months later Federal Cabinet was reported to have decided to 'defer' a decision on a referendum following the identification of referendum problems including opposition by the States, the wording, the historical reflection of changes posed in referendums', *Sydney Morning Herald* 14 July 1989.

¹⁵ A decision whether to support a referendum to amend the Constitution to confer specific power over the environment was reported to have been 'put on hold' by the Commonwealth Cabinet on 13 July 1989 (*Courier Mail*, 14 July 1989). The first appointed Ambassador for the Environment, Sir Ninian Stephen, suggested subsequently in an interview that the eventual decision on the referendum would depend on the effectiveness of the co-operation between the Commonwealth and the States, over the next two years, on the environmental matters (*The Age*, 24 July 1989).

¹⁶ Please see attached p36, Schedule 8 on World Heritage set out in the appendix to this thesis.

governmental disputes and making government and business decision making clearer.' ¹⁷ Gardner says:

It presents a statement of some basic principles and procedures for intergovernmental management and is intended to be a working document for regular government administration. ¹⁸

However, Mrs Kelly also said the Constitution required amendment if the Agreement failed. The legal status of such an Agreement is in question. It would appear the binding nature of the Agreement extends only to the degree accepted by the various governments. ¹⁹ For example, despite this Agreement the Federal Government has persisted in pursuing the nomination of the Lake Eyre Basin in South Australia without the consent, and indeed in light of the opposition of the State Government.

A fourth and final way is that the federal balance can be and has been influenced by the Australian court system. Since the Commonwealth Government's success in the Tasmanian Dams case, it has been more brave in testing the states and business because of the court's continuing broad and liberal interpretation of the Commonwealth's powers, particularly under certain paragraphs of section 51. ²⁰

This proclivity of the Commonwealth Government has been and remains a source of considerable tension between the states, business, the community and the Commonwealth. Nevertheless a surprising admission was made by the Prime Minister Rt. Hon. R. J. Hawke, in July 1989, who said: 'Under the Australian Constitution, the States and Territories have primary responsibility for protecting and regulating the environment'. ²¹ It is submitted that the ultimate decision should be which of the three levels of government are best suited to compare and

¹⁷ Financial Review, 10 April 1992.

¹⁸ Gardner, A, "Federal Intergovernmental Cooperation on Environmental Management", Environmental and Planning Law Journal vol. 11 (1994) at page 110.

¹⁹ Paragraph 2 of schedule 8 of the Intergovernmental Agreement on the Environment provides: '... The Commonwealth will consult the states and use its best endeavours to obtain their agreement ... The IGAE is phrased more like a guideline than a legally binding agreement.

²⁰ See also Davis, Bruce, "Federalism and Environmental Politics: An Australian Overview", (1985) 5/4 The Environmentalist.

²¹ Hawke, R J L, Our Country, Our Future – A Statement on the Environment (AGPS) Canberra July 1989, page 9.

assess competing interests in the land and then to implement the appropriate policies affecting the environment, our natural resources and their management. Certainly, the scope of the Commonwealth Government's influence has extended under recent common-law. It has focused more on stopping specific developments rather than implementing policies or regimes that apply to the full range of concerns involved in any development. To a degree this is understandable, because to date the state governments, and to an extent local government, have provided this development framework or legislative and regulatory regime. However, because the concept of World Heritage is a recent derivation introduced through and by the Commonwealth Government, it has taken a far more proactive role in developing the management regime for World Heritage areas in Australia. The implementation of the World Heritage Convention has been a Commonwealth Government initiative and the courts have accordingly granted it powers which have conflicted directly with powers that were traditionally the domain of state and local governments.

Accordingly, the following provides a review of the section 51 powers of the Commonwealth which authorise or may authorise the Commonwealth Government to either legislate or act pursuant to its executive powers with respect to the environment, and more specifically with respect to world heritage nomination, listing and management.²² The evidence presented demonstrates that the Commonwealth Government's powers have expanded in the past decade due to the changing and broad interpretation of section 51 (xxix) given by the High Court. Special attention is given below to section 51 (xxix) relating to the Commonwealth government's external affairs powers.

SECTION 51 POWERS

SECTION 51 – TRADE AND COMMERCE

Section 51(i) provides :

²² See also Fowler, R J, "Environmental Law and its Administration in Australia" (1984), *Environmental and Planning Law Journal* 10.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

i. trade and commerce with other countries, and among the states.

This is a power to regulate both interstate trade and commerce and overseas trade. However, power to regulate interstate trade and commerce is restricted by sections 92 and 99 of the Constitution. Section 92 provides that trade and commerce between the States shall be absolutely free. Section 99 prohibits the Commonwealth from regulating trade, commerce or revenue in such a way as to give preference to one state or another.

One may ask how such a power may have relevance to the environment, let alone World Heritage nomination, listing or management. The power is very broad ranging and includes nearly all activities relating and incidental to interstate trade and commerce which includes all commercial activity between the States and Territories. Power over overseas trade includes power to apply conditions, including environmental conditions, to imports and exports. In applying terms and conditions, it directly affects or influences the manner in which the resource extraction, or production, may take place.

Its relevance is clearly demonstrated in Murphyores Incorporated Pty Ltd v The Commonwealth.²³ This case involved the mining of sand on Fraser Island in Queensland. The Commonwealth government, following a request for an export licence, undertook an inquiry pursuant to the Environment Protection (Impact of Proposals) Act 1974 (Commonwealth). As a result of the inquiry, the Minister for Minerals and Energy proposed the imposition of certain restrictions on the export licence which would in effect ban sand mining. The application of the restrictions emanated from the inquiry and were based on environmental grounds. Murphyores argued that the Minister had neither the power or the discretion to attach such a condition to the mining of sand because it did not directly relate to trade and commerce as specified in section 51(i). The High Court unanimously upheld the Minister's right to use his discretion. Mason J said that it did not matter for what

²³ (1976) 136 CLR 1.

reason the Commonwealth Minister made the decision as, if it was within power, there could be no objection to its validity.²⁴

Accordingly, with regard to the management of the World Heritage, it is feasible that the Commonwealth Government may prohibit or deny permission for a certain activity if it is for the purposes of regulating interstate trade or commerce. The Commonwealth Government could ban the export of woodchips as it banned sand mining from all world heritage areas and base this legislative act on section 51(i).

SECTION 51(ii) – TAXATION, AND SECTION 51(vii) – BOUNTIES

These paragraphs relate to the taxation power of the Commonwealth and the power to levy bounties. It is currently used to encourage environmentally sensitive activities and to discourage acts detrimental to the environment, eg: tax deductability for the prevention of soil erosion, pursuant to section 75D of the Income Tax Assessment Act or taxation on pollution producing industries. Taxes may be levied for any purpose deemed appropriate by the Commonwealth, and at any rate it deems to be appropriate.

The Commonwealth Government's powers could extend, for example, to taxing all mining operations in World Heritage areas throughout Australia at twice the normal rate of other areas throughout Australia. This is not discriminatory between the States or in contravention of Section 92 because it would be based specifically on the Commonwealth Government's taxation powers not for environmental reasons.

SECTION 51(xx) – CORPORATIONS POWER

Section 51(xx) provides the Commonwealth power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. Again, any exercise of the corporations power for environmental reasons is limited by the prohibitions included in sections 92 and 99, as referred to above.

²⁴ 'It is no objection to the validity of a law otherwise within power that it touches or affects a topic on which the Commonwealth has no power to legislate.' *ibid.*, page 19.

The corporations power was used by the Commonwealth in the Tasmanian Dams case. In this case the majority found that the Hydro-Electric Commission was a trading corporation. However, prior to this in Strickland v Rocla Concrete Pipes Ltd²⁵, the power was extended to enable the Commonwealth to regulate the trading and financial activities of trading and financial corporations. Yet, an earlier view²⁶ held that mining and manufacturing corporations were not trading corporations. It is generally accepted that since the Strickland Case²⁷ such a view is no longer valid.²⁸ Indeed, it was held that even a football club was a trading corporation in Adamson's case.²⁹ Accordingly, if a corporation is established for any purpose and a substantial part of its activity is 'trading', it may be regulated by the Commonwealth Government on environmental or other grounds.

It would therefore appear that the Commonwealth would be within its power to regulate the environmental standards of corporations or the activities of corporations within a World Heritage area under this head of power. However, it would not, of course, extend to the regulation of the activities of individuals. In addition, there is some doubt as to whether the Commonwealth can regulate not only the trading activities of trading and financial corporations, but the non-trading activities, ie: any of their activities. Mason J in the Tasmanian Dams case (with whom Murphy and Deane J J agreed – all three being part of the majority with Brennan J) gave three reasons for the broad interpretation:

1. *It would be ridiculous to limit the legislative power to the financial aspects of financial corporations and the foreign aspects of foreign corporations. On the other hand, to give full powers over these corporations and a limited power over trading corporations would be irrational.*
2. *The well established principle that legislative power conferred by the Constitution should be liberally construed.*

²⁵ (1971) 124 CLR 468.

²⁶ The High Court in Huddart Parker v Moorhead (1909) 8 CLR 330.

²⁷ *ibid.*

²⁸ Crawford 'The Constitution and the Environment', 1991, 13 Sydney Law Review page 24.

²⁹ R v Federal Court of Australia and Adamson; Ex parte WA Football League (Inc) and West Perth Football Club (1979) 23 ALR 439.

3. *A power to make laws on corporations would naturally extend to their acts and activities.*³⁰

It would seem logical that the Mason J view be adopted; when considering foreign corporations in the same paragraph the Commonwealth has power to regulate all their activities, not just their 'foreign' activities.

In referring specifically to the scope of the Commonwealth power with respect to Section 51(xx), a legal commentator has noted:

Most recently the High Court, while finding that the Commonwealth could not legislate to provide for incorporation, emphasised that the power is one with respect to corporations not types of activities [NSW v Commonwealth (1990) 169 CLR 482].

He concluded:

*There is little doubt, therefore, that most trading corporations significantly involved in commercial activity could be regulated in all aspects including environmental respects. Thus, the Commonwealth would appear to have full power to regulate corporations engaged in woodchipping or other land and natural resource production. The same is true of financial or foreign corporations.*³¹

This appears to be a compelling argument. The Commonwealth will test the scope of this power as political pressures increase for the Commonwealth Government to regulate the impact of business activity on the environment.

SECTION 51(xxvi) – LAWS WITH RESPECT TO OTHER RACES

This paragraph provides the Commonwealth with the power to make laws with respect to 'people of any race'. This includes protecting the heritage of the Australian aboriginal and Torres Strait Islander people. This section has been used in conjunction with efforts by the Commonwealth to protect and preserve the environment.

The majority view held in the Tasmanian Dams case was that a law protecting the cultural heritage of the aboriginal race was a special law for the people of that race.

³⁰ Commonwealth v Tasmania (1983) 158 CLR 1 at 111.

³¹ John Bradsen, Australia's Constitution, land and vegetation and the environment, The Constitution and the Environment by the Centre for Comparative Constitutional Studies, 1991, page 30 at 37.

³² Accordingly, on this basis, the Commonwealth had power to legislate for World Heritage areas as provided in the World Heritage Properties Conservation Act 1983.

Since the Mabo High Court decision ³³ the Commonwealth Government will have increased opportunities to exercise its powers pursuant to section 51 (xxvi). Mabo style land claims necessarily involve claims to native title. These claims exist with respect to more than 15% of Tasmania as at September 1993. ³⁴ The scope of the Commonwealth Government's power with respect to aboriginal affairs has increased markedly since the Mabo High Court decision and the resulting aboriginal native title land claims, although the constitutional significance of the Mabo High Court decision and the various native title land claims have not yet been determined.

It is submitted that the Commonwealth Government's ability to regulate world heritage areas that are in fact owned by certain aboriginal people and granted pursuant to Mabo style land claims will not be different from the Commonwealth's ability to regulate world heritage areas on private property. If a Mabo style land claim is successful, the full rigours of the Australian constitution would continue to apply to such land as if it was part of Australia. Unless the Australian Constitution is otherwise amended it is difficult to foresee the owners of aboriginal land being excluded from consideration with respect to World Heritage areas. Even self-government for aboriginal and Torres Strait Islander people would not enable aboriginal land escaping consideration.

It is quite possible that both existing world heritage areas in Australia and potential world heritage areas may be subject to Mabo style land claims in the future.

In this High Court case, which commenced in 1982, it was held that the native title of the Murray Islanders was not extinguished by the mere change in sovereignty. The Murray Islanders were able to prove that a traditional connection with the land

³² op. cit. Mason J, 122, Murphy J, 148, Brennan J, 225 and Deane J, 256 – all referring to sections 8 and 11 of the World Heritage Properties Conservation Act 1983.

³³ (1992) 107 ALR 1.

³⁴ Advertisement in all major Australian newspapers on 29 September 1993.

had been substantially maintained. It was held the common law of Australia did not embrace the notion of *terra nullius* (or land belonging to no-one).

A question does arise, however, as to whether the nomination and listing of a world heritage area by the Commonwealth Government does, in fact, extinguish the native title. In this regard, the High Court held that the exercise of a power to extinguish native title must reveal a clear and plain intention to do so.

*A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title.*³⁵

Accordingly, it would appear that the mere nomination and listing of an area for world heritage would not extinguish the native title. It follows that the Commonwealth in regulating what is and is not done on the listed area will have to pay compensation pursuant to section 51 (xxxi) of the Constitution if acquisition does not occur on just terms. This is considered in detail in chapter eight, which examines the Bender's Quarry case study.

The recent Mabo High Court decision, therefore, does not affect the ability of the Commonwealth to use its powers pursuant to the World Heritage Conservation Act 1983 or the World Heritage Convention, but it does change the relationship between the Commonwealth Government and the landowner, ie: if a native title claim was successful, the property would necessarily be held by the aboriginal landowners rather than the State or territorial government.

SECTION 51(xxix) – EXTERNAL AFFAIRS

With respect to giving the Federal Government the opportunity to enact laws and regulations regarding environmental and land management concerns, section 51 (xxix) has become probably the most important of all the provisions of section 51. It provides a basis for Commonwealth law and regulations which implement treaties.³⁶ Many of these treaties relate to environmental concerns. The growth in

³⁵ Mabo and others v State of Queensland (1992) 107 ALR 1, at page 3.

³⁶ See Boer, B, World Heritage Disputes in Australia, Journal of Environmental Law and Litigation, vol. 7, (1992) at page 248.

number of international treaties has enabled the external affairs power to become increasingly relevant to a changing constitutional framework in Australia. The Commonwealth has an increasing opportunity to exercise its power and influence with respect to environmental and other matters, eg : industrial relations, women's and children's rights and defence issues due to the increase in the number of international treaties to which Australia is a party. Australia is now party to more than 2000 international treaties.³⁷

Crawford J has made the following comments with respect to international treaties and the link with the environment:

*At least fifteen Commonwealth Acts dealing specifically with the environment have been enacted under section 51(xxix) over the past fifteen years. It is true that some of these Acts were non-contentious exercises of the external affairs power. ... However some of the other acts – such as the World Heritage Properties Conservation Act 1983 and Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 – were much more controversial.*³⁸

There have been two major High Court judgments decided by a majority of 4 to 3 relating to Section 51 (xxix) and the extent of the Commonwealth Government's powers. The first related to the validity of the Commonwealth Government's Racial Discrimination Act³⁹ and the second, the World Heritage Convention.⁴⁰

In the first case, the Commonwealth relied on the International Convention on the Elimination of All Forms of Racial Discrimination to justify enacting such legislation. The Queensland Government challenged it and the High Court held it was valid, with three of the four majority judges saying that the mere existence of a treaty evidenced a matter of international concern and, therefore, the Commonwealth Government could legislate with respect to that subject. However, the second case, being the Tasmanian Dams case, clarified the situation to the extent that the High Court confirmed the ratio decidendi for the decision in Koowarta's case. The court held that the mere existence of an international treaty

³⁷ As at December 1989, Australia was party to 2018 treaties, Australian Treaty Series, Department of Foreign Affairs and Trade.

³⁸ Crawford J, (1991) 'The Constitution and the Environment', Sydney Law Review, March 1991, page 11.

³⁹ *QLD v Commonwealth (Koowarta)* (1982) 153 CLR 88.

⁴⁰ *Tasmania v Commonwealth* (1983) 46 ALR 625.

obligation was sufficient to give rise to an external affair.⁴¹ If the matter is one of international concern occurring outside Australia and touches on Australia's international relations it is valid.⁴² The very fact that there is in existence an international treaty to which Australia is a party demonstrates it is of international concern.

However, the High Court having justified the fact that the Commonwealth had power to enact legislation with respect to the World Heritage Convention which was signed by the Commonwealth in 1974, the extent of that power remained in dispute. The majority of the judges held that the Commonwealth Government had some obligations under the Convention to 'identify, protect, conserve, present and transmit to future generations the cultural and natural heritage areas referred to' (ie: those areas of outstanding universal value)⁴³ and, accordingly, the relevant provision under the World Heritage Properties Conservation Act 1983 giving the Commonwealth Minister the right to effectively prohibit construction of a dam in the World Heritage area was valid.⁴⁴ The minority of the judges held that the Convention imposed no such obligation.

Sornorajah had this to say about Deane J's view of the external affairs power.

... Deane J's judgment places strong reliance on international treaties. He pointed out that 'responsible conduct of external affairs will, on occasion, require observance of spirit as well as the letter of international agreements, compliance with recommendations of international agencies and pursuant of international objectives which cannot be measured in terms of binding obligation.

*The constantly changing nature of international relations does not permit an inflexible definition of the scope of the external affairs power. An understanding of the changes were seen as necessary to de-limit its scope at every stage.*⁴⁵

⁴¹ 1983 46 ALR 625 Mason, Murphy, Brennan and Deane J.J. at 628.

⁴² Michael Coper, *The Franklin Dam Case*, Butterworths, (1983) at pages 6 to 11.

⁴³ Article 4, World Heritage Convention.

⁴⁴ Michael Coper, *The Franklin Dam Case*, Butterworths, (1983) at pages 8.

⁴⁵ Sornarajah, *International Law and the South West Dams Case*, 'The South West Dam Dispute : the legal and political issues', Hobart 1983, at page 33.

Thus it is widely accepted that this head of power grants to the Commonwealth Government a flexible and changing basis to act on matters of international concern.

The decision of the majority in the Tasmanian Dams case was reaffirmed in both Richardson v Commonwealth⁴⁶ (the 'Tasmanian Forests case') and Queensland v Commonwealth⁴⁷.

In the Tasmanian Forests case, the issue was whether the obligations of Australia under the World Heritage Convention extended to items not yet identified as having World Heritage value, ie: they had not been listed or identified. The Federal Government established the Helsham Inquiry to advise whether the whole or parts of the Lemonthyme and Southern Forests were of World Heritage value. It was found the Federal Government had a right to protect potential World Heritage areas on an interim basis pending identification where there was a reasonable basis for supposing that obligations may arise under an international treaty.⁴⁸ There had to be a reasonable foundation for the decision that the property was likely to hold World Heritage value, ie: provided the legislation was reasonably capable of being seen as an appropriate measure.

In the latter case, the Federal Government had nominated the Queensland Wet Tropical Rainforests for World Heritage listing and made proclamations and regulations under the World Heritage Properties Conservation Act 1983. The Queensland Government sought a declaration of invalidity of the proclamation of property. The dispute revolved around whether the property was an 'identified property' under Section 3A of the Act. The Queensland Government argued the fact that the property had been listed was not conclusive evidence of it being of outstanding cultural or natural heritage and that the court must independently be satisfied of the site qualities in order for the proclamation to be valid. The High Court held that: 'so long as the property is included in that list, the state party on whose territory the property is situated and who submitted an inventory including

⁴⁶ (1988) 164 CLR 261.

⁴⁷ (1989) 167 CLR 232.

⁴⁸ See also Tsamenyi, B and Bedding, J M, Implementing Environmental Law in Australia – Queensland v Commonwealth; Journal of Environmental Law (1990) vol.2, page 108. (1988) 164 CLR 261.

the property as part of the cultural and natural heritage is under an international duty to protect and conserve it.' ⁴⁹

Koowarta, the Tasmanian Dams case, the Tasmanian Forests case and Queensland v Commonwealth all have two things in common, namely, the Commonwealth Government's willingness to use Section 51 (xxix) of the Constitution (external affairs power) and immense political controversy arising from its use. On each occasion the Commonwealth won the legal dispute and the High Court either confirmed or extended its interpretation of the Commonwealth's powers with respect to this head of power. Disputes relating to world heritage in Australia are highly emotional, political, time consuming and expensive. The legal disputes cannot be assessed in a vacuum. They occurred because of the 'politics of the environment' in a bitter and divisive atmosphere. ⁵⁰ The broad view in these cases was not only reaffirmed but extended to allow the Commonwealth to take whatever action of an interim nature that was reasonably necessary to identify, protect and conserve the heritage values of the area of concern. These measures included the limitation or prohibition on all 'prescribed' activities, eg: forestry and mining. Following the interim measures imposed by the Commonwealth Government, it would then decide to what extent protection or conservation was required. The scope of the treaty 'obligations' had to be considered in this context. Accordingly, the Commonwealth power extends to the point of enacting into domestic law the obligations it sees as appropriately imposed under the treaty, and matters relating and incidental to those obligations.

The broad view as accepted by the majority of the High Court could allow the Commonwealth Government to have a seemingly endless range of powers. This fact remains despite the external affairs power being 'purposive' – based on the 2000 or more international treaties currently existing to which Australia is a party, and from which the Commonwealth acquires the power to give effect to the purpose(s) of the international treaty. With each of the above High Court decisions,

⁴⁹ *ibid.*, page 477.

⁵⁰ For further commentary in this regard, Juliet M. Behrens (Nee Bedding) lecturer in law, University of Tasmania, paper delivered at Our Common Future workshop, University of Tasmania, July 1990, at page 6. Unpublished but available at Law Library, University of Tasmania.

the Commonwealth's powers were considerably enlarged with respect to Section 51 (xxix).⁵¹

Interestingly, the Final Report of the Constitutional Committee (Summary 1988) recommended that:

1. *No alteration be made to section 51 (xxix) of the Constitution.*
2. *There should be established by the Premiers' Conference an Australian Treaties Council with the composition and functions recommended by the Australian Constitutional Convention.*
3. *The Commonwealth should consider improvement in the existing procedures for Federal and State consultation on treaties in the light of comments made by some State Governments and the recommendations of the Australian Constitutional Convention.*
4. *A Federal Act should provide that all matters referred to the Australian Treaties Council be tabled in both Houses of the Parliament at the time of referral to the Council.*⁵²

The Constitutional Committee stated the current position with respect to the Commonwealth power over environmental matters.

It was held in the Tasmanian Dams Case, that, under section 51(xxix), the Parliament had power to make laws to implement the obligations of the Commonwealth under a treaty to which it was a party.

This power is restricted by the following considerations:

- a) *The treaty must be 'genuine' or 'bona fide'. It must not be a mere device for attracting legislative power.*
- b) *The power is subject to those express limitations that restrict federal power generally, such as sections 80, 92 and 116 and the implied limitations (discussed in Chapter 2 of our Final Report) which prevent the Commonwealth from discriminating against the States or threatening their existence or capacity to function.*

⁵¹ Stark said this about the expanding view of Section 51 (xxix) :- 'a considerable enlargement of the ambit of the Commonwealth Parliament's legislative power with respect to external affairs under placitum (xxix) of Section 51 of the Federal Constitution.' Commentary on the High Court case in Richardson v Forestry Commission (Tas) (1988) 164 CLR 261, J G Stark, QC (1988) Australian Law Journal 319.

⁵² at page 56.

*c) A law implementing the treaty must be one that can be regarded as a reasonable and appropriate means of giving effect to its object. The Federal Parliament does not, by being party to a treaty, acquire a general power to make any law it wishes with respect to the subject of the treaty.*⁵³

The making and ratification of treaties in Australia is a function of the Executive. In the US the treaties are signed by the President but must be ratified by the Senate. The minority report of the Constitutional Committee recommended that treaties in Australia should be ratified by either:

- a) the approval of both Houses of federal Parliament or
- b) the non-disallowance by either House within a specified period.

In essence, the minority were concerned that the Executive Government had power to make laws on any matter at all 'merely because it happened to be the subject of a treaty.'⁵⁴

Australia's treaty ratification procedure has come under continuing criticism since the second world war. A State Government, by convention, has the opportunity to comment on a treaty before it is ratified by the Commonwealth Executive but comment is all it can do. In addition, there is no opportunity for public comment and, in fact, the public are rarely educated with respect to the implications of the ratification of any treaty. In essence, the current system allows for significant changes to Australia's legal system without a careful review or even the consent of the Federal, State or Territory Parliaments.

It is also interesting to note that the Constitutional Committee did not recommend that the Constitution be altered by adding an express provision to empower the Federal Parliament to make laws with respect to the environment, inter alia.

One commentator expressed the trend in the growth of international treaties as follows :-

⁵³ at page 57.

⁵⁴ at page 59.

The basic premise that relationships with international organisations are a vital aspect of external affairs seems indisputable. It follows that (as an executive matter under Section 61) the Commonwealth must have plenary power to select and formulate the policies and programs which are suitable in its view as a basis for Australian participation in the work of such organisations, or for negotiations with them. This follows in turn that, as a legislative matter under Section 51 (xxix), the Commonwealth must have adequate power to ensure the effective pursuit of its chosen policies and programs in the relevant international forum by taking such steps within Australia as any particular program requires. (page 61).

Any international 'obligation' borne by Australia can now be implemented through legislation under section 51(xxix), (page 62)
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Accordingly, and finally, the scope for an expanding and even burgeoning power base for the executive government of the Commonwealth is clearly not far from reality when one considers Australia is currently party to over 2,000 treaties ⁵⁶, the vast majority having been signed since the second world war, and with a further 30 to 50 new treaties per year. Of the total, an increasing proportion relate to environmental issues ⁵⁷, including, in 1992, the United Nations Convention on Climate Change ⁵⁸ signed in New York, USA and the Convention on Biological Diversity ⁵⁹ signed in Rio de Janeiro, Brazil.

SECTION 51(xxxix) – THE INCIDENTAL POWER

This important provision gives the Commonwealth Government the ability to enact laws and regulations with respect to matters relating and incidental to the other powers of the Commonwealth set out in section 51.

⁵⁵ A R Blackshield, *Damadan to Infinities. The Tourneyold of the Waterfalls* by a collection of essays the South West Dam Dispute : the legal and political issues, Hobart 1983.

⁵⁶ 2018 as at December 1989 with an increase of approximately 30 to 50 each year, Australian Treaty Series, Department of Foreign Affairs and Trade.

⁵⁷ 45 multilateral treaties on the environment were signed between 24 January 1924 and 10 September 1990.

⁵⁸ signed 9 May 1992.

⁵⁹ signed 5 June 1992.

Other powers under section 51 which may have an impact on the environment would include section 51 (v) – Posts and Telegraphs Power; (vi) – the Defence Power; and (xiii) – the Banking Power.

USE OF COMMONWEALTH POWERS OTHER THAN SECTION 51

The Commonwealth has the means to exert considerable influence over the states and territories, despite not having a direct legislative role pursuant to section 51.

The use of section 96 of the Constitution provides the machinery and flexibility for the Commonwealth to exert this. 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any state on such terms and conditions that the Parliament thinks fit.'

The grants made pursuant to this section have been known as 'tied' grants and are made on specific terms and conditions. In parallel with the grants to the states, the Commonwealth has power to exercise control over borrowings by the states and territories and their various agencies. They require Loan Council approval to raise funds. Because the Commonwealth is in a position to prevent the states from borrowing such monies, its influence is considerable. Again, certain terms and conditions, including those relating to the environment, could be made prior to approval being given.

Section 81 relates to the national implied power where appropriations must be made for the 'purposes of the Commonwealth'. The AAP case ⁶⁰ confirms the existence of this implied power, but its full extent is not clear. An example of the national implied power used in this case was the establishment of the CSIRO. Mason J said 'no doubt there are other enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time. As time unfolds, as circumstances and conditions alter, it will

⁶⁰ *Victoria v The Commonwealth* (1975), 134 CLR 338.

transpire that particular enterprises and activities will be undertaken, if they are to be undertaken at all, by the national government.' ⁶¹

However, there appears to be a strong argument that the existence of a national implied power does not justify the Commonwealth acting outside the heads of Commonwealth legislative power, as provided in the Constitution, for merely convenient or 'helpful' purposes. Despite the uncertainty surrounding this provision, the High Court to date has not struck down as unconstitutional any funding under a Commonwealth Government program pursuant to this section. It is not unlikely, for example, that the Commonwealth would be acting within its powers to expend monies on environmental projects that were part of Australia's 'The Year 2000' celebrations.

Section 61 provides for the Executive Power of the Commonwealth. This power enables the Commonwealth to establish administrative and co-ordinating activities with the states for research, advice, administration and other similar matters. It is interesting that two prominent legislative acts of the Commonwealth relating to the environment include the Australian Heritage Commission Act 1975 and the Environment Protection (Impact of Proposals) Act 1974. Both these Acts rely, for their legislative authority, primarily on Section 61. The legislation outlines the processes, assessments, inquiry and identification measures of the Commonwealth and does not directly regulate individuals or corporations. So the Commonwealth possessed 'full power to legislate with respect to itself'. ⁶²

Section 122 of the Constitution provides the Commonwealth with complete sovereign power over the Territories. The Northern Territory, however, was granted self-government by an Act of the Commonwealth Parliament in 1978 and power was handed over on 1 July 1978. The Australian Capital Territory was granted self-government by an Act of the Commonwealth Parliament in 1988 and power was handed over on 11 May 1989. The Commonwealth, nevertheless, legally retains general legislative authority over those territories that have achieved

⁶¹ *ibid.*, page 397.

⁶² John Bradsen, Australia's Constitution, Land and Vegetation and the Environment, in *The Constitution and the Environment*, Centre of Comparative Constitutional Studies, 1991 page 30 at page 48.

self-government.⁶³ However the Commonwealth may be able to act pursuant to section 81 which provides that all revenues or monies raised or received by the Executive Government of the Commonwealth shall form one consolidated revenue fund, 'to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution' (emphasis added). The scope and definition of the words 'the purposes of the Commonwealth' is still unclear. It appears that the Commonwealth can appropriate and spend money pursuant to section 81 but it does not allow the Commonwealth to regulate others receiving such funds. It seems the Commonwealth could allocate funds for a specific environmental purpose.⁶⁴ Close attention to this provision might provide an opportunity for the Commonwealth to extend its interest in environmental concerns.

CONCLUSION

The broad and liberal interpretation by the High Court of Australia of the Commonwealth Government's powers under section 51 of the Australian Constitution has markedly increased the power and influence of the Commonwealth Government. This growing influence has been specifically relevant to environmental matters where, in a series of High Court decisions, the scope of the Commonwealth Government's power with respect to the environment increased markedly (perhaps more than desired or envisaged by the High Court at the time). These High Court decisions included *Koowarta's case*, the *Franklin Dams case*, the *Tasmanian Forests case* and *Queensland v Commonwealth* (1989), and related specifically to section 51 (xxix) and in three of the four cases related to the Commonwealth Government's powers emanating from its responsibilities under the World Heritage Convention.⁶⁵

It should be acknowledged :-

⁶³ Section 122.

⁶⁴ Ass. Prof. Robert Fowler, *Australian Environmental Law News*, March/April 1993, page 62.

⁶⁵ Excepting *Koowarta's case*.

- a) the states remain the dominant or most substantial landowner in every state;⁶⁶
- b) the states and territories have been bestowed with the majority of land management responsibilities, having commenced fulfilling these responsibilities well before the time of federation, and more specifically since white settlement; and
- c) despite the Commonwealth being granted specific powers at federation pursuant to section 51, no such powers were granted specifically to the Commonwealth Government with respect to the environment and land management. Indeed the High Court have interpreted section 51 (xxix) in such a broad way as to grant the Commonwealth enormous powers with regard to the environment, land management and, specifically, world heritage nomination, listing and management.

Notwithstanding the above the Commonwealth–State balance of power can be changed in four ways :–

- a) by the referral of power from the states to the Commonwealth pursuant to section 51 (xxxvii) of the Constitution;
- b) via a referendum pursuant to section 128 of the Constitution;
- c) through a system of co-operative federalism; and
- d) by the common law and, specifically, by the High Court.

The evidence presented demonstrates that the High Court has been the substantial and dominant force for change in favour of the Commonwealth. Of the section 51 Commonwealth powers, the external affairs power provides a wide scope for the Commonwealth Government to enact laws and regulations with respect to environmental concerns. There are now some 45 treaties relating specifically to the environment – the most recent being the Convention of Biological Diversity, signed

⁶⁶ Despite the Mabo High Court decision and likely or probable claims for land pursuant to this decision.

on 5 June 1992, by the Commonwealth Government.⁶⁷ It is submitted that Australia's treaty ratification procedure is in need of a rigorous review.

In summary, the broad interpretation of the external affairs power by the High Court together with a liberal or centralist interpretation of the corporations, trade and commerce, financial and other Commonwealth powers over the past decade has eroded the concept that the States have the primary responsibility for the environment and land management. This is despite the concept being publicly endorsed by the Prime Minister in 1989.⁶⁸

Sir Harry Gibbs, former Chief Justice of the High Court (1981 to 1987), recently said:

If the powers of the Commonwealth are capable of indefinite expansion, it naturally follows that the powers of the States are at risk of annihilation ...

*In the case of a nation such as Australia, which covers a far flung geographic area, the federal system enables that level of government which ought to be most directly concerned with the ordinary affairs of the people – that is the States – to be close enough to the people to have a true understanding of local feelings and local needs.*⁶⁹

It is not surprising that Premiers of two of Australia's outlying states have recently called for an audit of State and Federal responsibilities. Premier Groom said 'Tasmania supports Western Australia in it's concerns about the steady erosion of the rights and responsibilities of States under the Keating Government and previous Labor Governments... I have no doubt the audit will disclose a very dangerous trend towards centralisation of power in Canberra ...'⁷⁰ The Premier of Tasmania even went so far as to say 'We have suffered very badly through World Heritage listings and the abuse of the National Estate concept as well as in funding.'⁷¹

⁶⁷ As at December 1993.

⁶⁸ R.J. Hawke, *Our Country, Our Future – A Statement of the Environment* (AGPS), July 1989, page 9.

⁶⁹ Gibbs, C.J. Article 'Curb Federal Powers, says ex-Chief Justice', *The Australian* newspaper, 30 October 1993.

⁷⁰ Media release by Premier of Tasmania, the Hon. Ray Groom M.H.A., on 18 January 1994 set out in the appendix.

⁷¹ *ibid.*

It is submitted that the broad and liberal approach taken by the High Court in recent years has been the cause of much of the continuing conflict and controversy in Australia's environmental politics, particularly as it relates to World Heritage.

Chapter 5

THE LEGISLATIVE FRAMEWORK FOR NOMINATION AND PROTECTION

INTRODUCTION

Australia has legislated into domestic law its perceived obligations under the World Heritage Convention and this legislation, the World Heritage Properties Conservation Act 1983 and the Conservation Legislation Amendment Act 1988, is reviewed in this chapter. Although the domestic legislation relates primarily to the protection of world heritage, the nomination and listing process is outlined in this chapter also.

One of the methods of identifying world heritage is the Commission of Inquiry approach which was undertaken in Tasmania pursuant to the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 and this Act is referred to below. The Australian Heritage Commission Act 1975 allows the federal government to partially fulfill its obligations under the Convention and that legislation has been considered in chapter 3. Finally, the two other Acts of the federal parliament that facilitate, at least in part, Australia meeting its obligations under the Convention are the National Parks and Wildlife Conservation Act 1975 and the Great Barrier Reef Marine Park Act 1975.¹

Before departing from the legislative framework for world heritage protection in Australia mention is made of the fact that a very comprehensive legislative framework for the protection and conservation of Australia's natural heritage exists within each of Australia's States and Territories.

This chapter also includes an overview of the process for nomination and listing of world heritage areas in the USA. The rigorous and comprehensive review process is compared to the Australian procedure. The chapter ends with a conclusion.

¹These Acts have not been reviewed in this chapter because they are of far less significance to the other Acts referred to.

THE WORLD HERITAGE PROPERTIES CONSERVATION ACT 1983

BACKGROUND

The World Heritage Properties Conservation Act 1983 was enacted by the Hawke Labor Federal Government to implement in part Australia's obligations under the World Heritage Convention which was ratified by Australia on 22 August 1974. At the time no country in the world had enacted legislation to implement its obligation under World Heritage Convention. Although the legislation, on its face, was enacted to fulfill its obligations under the Convention, and specifically articles 4 and 5, there were other reasons and these are detailed below.

As at January 1995, there were 140 member countries party to the World Heritage Convention. As of January 1995 the total number of entries on the World Heritage List was 440, of which 326 were cultural properties or sites and 97 natural sites and 17 mixed sites.²

Australia was a member of the World Heritage Committee from 1976–83 and 1985–89 and was also represented on the World Heritage Bureau in 1980–81, 1981–82, 1982–83, 1984–85, and 1988–89.

Despite the official reason for enactment of the legislation, it was enacted and then acted upon primarily for political reasons as discussed below.

*While this Bill is not aimed solely at the protection of that particular property (the Western Tasmanian Wilderness National Park), it is the inability of the Commonwealth Government to prevent the substantial destruction of the property by any other means that has led to the introduction of this Bill as one of the first Parliamentary acts of the government. In doing this, the government is fulfilling a commitment given to the people of Australia and is supported by the overwhelming majority of the Australian people.*³

Accordingly, the World Heritage Properties Conservation Act 1983 fulfilled a promise of the federal Labor Party during the 1983 federal election campaign to

² Department of the Environment, Sport and Territories World Heritage Listing – What does it really mean Australian Government Publishing Office (1995).

³ Second Reading speech, Hon. Barry Cohen, MP, Minister for Home Affairs and Environment, House of Representatives, 21 April 1983, page 53.

stop the Franklin Dam development in South-West Tasmania proceeding. It was the first piece of legislation introduced into the federal Parliament following the election of the Labor Party to government at the 5 March 1983 election.

At the time of debate in the Senate (May 1983), 72 countries had become party to the World Heritage Convention and 136 properties were on the World Heritage List. Five Australian sites had been nominated by Australia and were on the World Heritage list:

- . The Great Barrier Reef;
- . Kakadu National Park;
- . Willandra Lakes Region;
- . Lord Howe Island Group;
- . Western Tasmanian Wilderness National Park.

The Franklin Dam development was situated in the Western Tasmania Wilderness National Park which had been inscribed on the World Heritage list in December 1982. This was preceded by a recommendation for nomination by the then Premier of Tasmania, the Hon. Doug Lowe, in 1981 to the then Federal Liberal Prime Minister, Rt. Hon. Malcolm Fraser. The nomination to the World Heritage Committee by the Federal Liberal Government proceeded in 1981. However, following the election of Mr Robin Gray as the Liberal Party Premier in February 1982, Mr Gray requested the nomination by the Federal Liberal Government be withdrawn. The Federal Liberal Government refused this request and it was accepted by the World Heritage Committee for listing in December 1982.

Labor Senator Gareth Evans had this to say about the federal government's Bill:

*This Bill is to provide a means of protection of last resort; its provisions are to be invoked when it appears that other means are not available or are inadequate or unsuitable to meet a threat of damage or destruction to heritage property. It is the government's intention that the procedures under the Bill would not be resorted to if effective action can and will be taken under State or Territory law. It follows that there would normally be consultation with the States or Territories.*⁴

⁴ Senate Hansard 20 May 1983, page 319.

These statements sound somewhat hollow when one considers the closure of Bender's Quarry in south-west Tasmania on 20 August 1994. The quarry was closed without notice to the owner and the decision was made unilaterally by a Federal Government Minister. Further details are provided in chapter eight.

The legislation was enacted pursuant to Australia's responsibilities with respect to Articles 4 and 5 of the Convention. Article 5(d) is particularly relevant. It provides:

to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.

The Australian Financial Review, following the election of the Hawke Federal Labor Government, said:

A major constitutional crisis was really not a good way to kick off a Government committed to consultation and unity ... But there must be a limit to the extent to which the Commonwealth can enter into international agreements in order to override the States. If Mr Hawke is really committed to reconciliation, he will have to forget about using a legal bludgeon to bring Tasmania into line ... What we may end up looking at is not the price of the dam and its alternatives, but the price of living in a true Federation and maintaining State's rights within it.⁵

An analysis of the Act and the Hansard should be considered in light of the urgency and fervency of both the Federal Labor Government and the State Liberal Government to show that each was right.

The regulations enacted by the Federal Government pursuant to section 69 of the National Parks and Wildlife Act 1975 to stop the dam construction proceeding were made by the Federal Government on 30 March 1983, just 25 days after the election. The Federal Government, in an effort to obtain evidence to support its case against the state of Tasmania in the High Court, used Royal Australian Air Force planes to fly over the relevant areas of south-west Tasmania to ascertain what work and/or damage had been done to the area. The following remarks were made in the Senate during an emotive and politically divisive period:

⁵ 8 March 1983, three days after the election.

That leads us to 30 March of this year when the Federal Government made regulations under section 69 of the National Parks and Wildlife Act purporting to prohibit construction work. Then unfortunately we had the foolish and antagonistic move on the part of the Attorney-General (Senator Gareth Evans) to send the Royal Australian Air Force to Tasmania to gain evidence for the Commonwealth's case.⁶

It is the first time in the history of Australia that, less than a month after taking power, the Federal Government has taken a State to the High Court of Australia and had used the armed forces to gather secret evidence to use in that law case against the State.⁷

In arguing against the Bill, Senator Walters said the Federal Government's legislative initiative was consistent with the Prime Minister's efforts to abolish the States. She quoted the Prime Minister, Mr Bob Hawke, in his Boyer lectures of 1979, where he said :-

I believe ... that Australians would be better served by the elimination of the second tier of Government – that is, the states ... Which no longer serve their [the states] original purpose and act as a positive impediment in achieving good government in our current community. This would give us, like the great majority of other countries, one Parliament with powers available to the Government to match the responsibilities upon it of protecting and advancing the interests of Australian citizens.⁸

The focus of the debate and discussion related to, firstly, the appropriateness of building a dam in south-west Tasmania but then, secondly, whether the Federal Government had the right to prohibit the Tasmanian Government building the dam. The Liberal Party, both state and federal, said it did not have that right, whereas the Federal Labor Government said it did have the right and legislated in accordance with its policy. The legislative actions of the Federal Government were seen in political terms by most people. The following emphasises the powerful and important role of the conservation lobby groups.

⁶ Senator Robert Hill, South Australia, 20 May 1983 page 388.

⁷ Senator Shirley Walters, 11 May 1983 at page 394. It should be noted the Tasmanian Government had denied representatives of the Commonwealth Government access to the relevant area to assess if the Tasmanian Government was in breach of the Act.

⁸ *ibid.*

Mr Ray Groom, as a Member of the House of Representatives,⁹ made the following remarks on 5 May 1983:

*In political terms, this is a sad day because the reason this Bill is before the House is the honourable members on the government side have been influenced by this pressure group (The Tasmanian Wilderness Society) – these trendies and radicals who are using the Franklin River as a cause. They are not really in love with the Franklin River but are political animals that are against all progress and all development of this country and they are just using this river for their own purposes, and some of them to advance their own causes. Many of them like to grandstand, including Dr. Bob Brown, who goes all around Australia. He is a well known grandstander. He was a grandstander before he became involved in this issue.*¹⁰

The Federal Labor Government, it was widely believed, was responding to the efforts of the conservation lobby in the hope of attracting swinging voters in the marginal seats in mainland Australia.

The Federal Liberal Opposition at the time proposed a motion for the purposes of amending the legislation. The motion was aimed to respect and understand the rights of the States, allowing them to fulfill their responsibilities pursuant to the prerogative traditionally in the purview of the states, that is, to govern the use and management of land. The amendment also highlighted the inadequate procedures within the legislation as they related to fair and reasonable compensation for government, corporations, or individuals.

The motion moved by Senator Martin (Queensland) was as follows:

but the Senate –

a) while recognizing the need for adequate protection of areas placed on the World Heritage List, urges the Government to amend the Bill to take account of the need for individual listings to be the subject of a joint request by both the Parliament of the State which has made the application, and of the Commonwealth; and

⁹ Mr Ray Groom, MHA, is now Premier of Tasmania (September 1994), being elected on 1 February 1992.

¹⁰ Mr Ray Groom, House of Representatives Hansard, 5 May 1983, page 252.

*b) is concerned that the Government has failed to develop adequate procedures for the provision of fair and reasonable compensation to States, corporations or individuals whose property may be the subject of proclamation under the Act.*¹¹

The motion was lost, but it highlighted two of the inadequacies of the Bill. The first being the benefits that would otherwise ensue where the State Governments and, specifically, State Parliaments are consulted. Furthermore, their consent to the nomination of an area for listing was not required under this Bill.

The second inadequacy being the failure to provide in the Bill for adequate compensation to those owners of land who have their property listed and consequently adversely financially affected or those with some other interest in the land, such as mining, exploration, forestry or farming leasehold or licence rights who have been, are, or will be, adversely affected. The Act provided for compensation only where the property was compulsorily acquired.

CONSTITUTIONAL CONCERNS

The legislation was based on various heads of constitutional power, namely, the external affairs power [section 9], the Territories power [section 6(1)], the nationhood power [section 6(2)(c)]; the corporations power [section 10]; and the races power [section 11]. Various aspects of the constitutionality of the legislation which have been subject to considerable litigation since its enactment are discussed below.¹²

In addition to the concerns expressed with regard to its constitutionality and the inherently political motivation for the legislation, it is advantageous to be aware of the omissions in the legislation. If the legislation was designed to institute into the law Australia's responsibilities under Articles 4 and 5 of the Convention, it was wholly deficient in not including a comprehensive legal and administrative framework for the nomination, listing and management process. In particular, the omission to establish a procedure to satisfy Article 11(1) of the Convention

¹¹ Senate Hansard, 11 May 1983 at page 379.

¹² Tasmania v Commonwealth (1983) 46 ALR 625 or (1983) 158 CLR 1.
Tasmanian Forestry Commission v Richardson (1988) 164 CLR 261.
Queensland v Commonwealth (1989) 167 CLR 232.

requiring the preparation of an inventory or 'interim list' indicated Australia had been negligent in the responsibilities it had under the World Heritage Convention.

THE OPERATION OF THE ACT

As has been indicated, the Act deals only with certain aspects of the protection of the World Heritage areas or potential World Heritage areas in Australia. For the purposes of nomination of a world heritage area, there is normally a period of consultation and negotiation between both the State and Federal Governments but this process is outside the scope of the Act. The Federal Government then relays its recommendation to the World Heritage Committee. The guidelines for the nomination process are detailed in the following chapter on the Administrative Framework. However, prior to 1984 the nomination process required consultation between the State and Federal Governments and, in fact, the consent of the State Government was required before the Federal Government would initiate a nomination. Furthermore, the Federal Government relied on the initiative of the State Government to submit the nomination. Since 1984 the consent of the State Government has not been required by legislation or in an administrative sense. The procedure today requires the Federal Department of the Environment, Sport and Territories (DEST) to confer with the relevant federal specialist agencies such as the Australian Heritage Commission (AHC) Australian National Parks and Wildlife Service (ANPWS), [now Australian Nature Conservation Agency (ANCA)], the Bureau of Flora and Fauna (BFF) and the CSIRO. Nominations must be received by the World Heritage Committee by 1 October at the UNESCO Paris headquarters. By 1 November, the Committee's Secretariat registers each nomination, checks and verifies its contents and transmits the nomination to the appropriate international advisory body, ie: ICOMOS or IUCN, or both. The recommendation of these bodies is completed by 1 April and returned to the Secretariat in Paris. The recommendation and evaluation are then returned to the State parties who are members of the Committee. During June and July the World Heritage Bureau examines the nomination and makes its recommendation thereon to the Committee. During December of that year the Committee examines the nomination and the Bureau's recommendation and in the following January transmits its decision to the

relevant State parties.¹³ The diagram set out in the appendix to this thesis provide an overview of the World Heritage Organisation and the World Heritage Listing Process.

In regard to the 1989 nomination of further areas for world heritage in Tasmania, the IUCN was represented in its investigations by Mr Jim Thorsell. Mr Thorsell made two site visits to Tasmania and in a four page report to the IUCN recommended the additional area be listed. Mr Thorsell made reference to the mining potential of the area in his report saying:-

a final point affecting integrity pertains to small-scale mining operations ... They are all very marginal in nature and it is extremely unlikely that major deposits will be found ... It is hoped that these operations will gradually be phased out ...

South-west Tasmania is a mineral rich part of the State, but access has in the past been difficult. It is submitted that it is of great concern that such a four page report could be the basis of the IUCN's advice to the World Heritage Committee and hence a substantial piece of evidence upon which the World Heritage Committee makes its decision. Despite this observation under the Act the Minister is not required to take into account resource and economic considerations. The Minister's only consideration is the conservation of the area. Tasmanian mining companies and government experts were apparently not consulted. The Thorsell Report is set out in the appendix to this thesis.

The Act is not designed to control all activities in the world heritage areas but, because of its far-reaching protection and conservation provisions, the Commonwealth has been ceded more and more power and responsibility over the management of the area and not simply its protection. The Act specifically enables the Commonwealth to prevent damage or destruction to the World Heritage values of the area by regulation and through the prescribing of certain acts, but this very fact, combined with the Commonwealth's perceived responsibilities and obligations pursuant to the Convention, grants the Commonwealth broad ranging powers over these areas without acquiring the property.

¹³ Operational Guidelines Revised February 1995, paragraph 66.

The following reviews the operation of the World Heritage Properties Conservation Act 1983 as enacted. The 1988 amendments are considered separately later in this chapter.

IDENTIFICATION OF THE PROPERTY

Section 3(2) provided two methods by which a property can be considered 'identified' property and therefore subject to protection under the Act. The first method includes property that the Commonwealth has submitted to the World Heritage Committee as part of the cultural or natural heritage for inscribing on the World Heritage List, [Section 3(2)(a)(i)]. The second method includes property that the Commonwealth Government declares by regulation as forming part of the cultural or natural heritage [Section 3(2)(a)(ii)].

The second method is indicative of the Commonwealth Government's efforts to broaden its powers. This method requires no established procedures to determine why the property is classified, and on what basis. The Commonwealth Government agreed that the protection pursuant to the Convention was necessary for all World Heritage areas, whether they were nominated, listed or considered as possibly of World Heritage value.¹⁴ This latter point is clearly an approach that calls into question the very existence of the Act. Why is it necessary to nominate areas for listing if these areas can be identified by simply making a regulation and subsequently affording these areas protection? It is fair to say that the second method demonstrated the use of the big stick approach. Nevertheless, its inclusion is reflected in Article 12 of the Convention.¹⁵

PROTECTIVE PROVISIONS AND RELATED SECTIONS

Sections 6, 7 and 8 each set out the basis or reasons for which protection of the identified property should apply. The main protective provision is section 9 which applies when the Governor-General has proclaimed the identified property to be a property to which that section applies. The other protective provisions are sections

¹⁴ Tasmania v Commonwealth (1988) 164 CLR 261.

¹⁵ Article 12 provides the fact that an area has not been included in the world heritage list does not mean it is not of outstanding universal value.

10 and 11. Before reviewing these protective provisions, sections 6, 7 and 8 are reviewed. Section 6(3) provides :

Where the Governor-General is satisfied that any property in respect of which a proclamation may be made under this subsection is being or is likely to be damaged or destroyed, he may, by proclamation, declare that property to be property to which section 9 applies.

Section 9 sets out the actions which are 'unlawful', except with the consent in writing of the Minister. Sections 6(2) (a) to (d) derive primarily from Australia's obligations under the World Heritage Convention. Specifically, they are :

- a) the Commonwealth has, pursuant to a request by the State, submitted to the World Heritage Committee under Article 11 of the Convention that the property is suitable for inclusion in the World Heritage List provided for in paragraph 2 of that Article, whether the request by the State was made before or after the commencement of this Act and whether or not the property was identified property at the time when the request was made;*
- b) the protection or conservation of the property by Australia is a matter of international obligation, whether by reason of the Convention or otherwise;*
- c) the protection or conservation of the property by Australia is necessary or desirable for the purpose of giving effect to a treaty (including the Convention) or for the purpose of obtaining for Australia any advantage or benefit under a treaty (including the Convention);*
- d) the protection or conservation of the property by Australia is a matter of international concern (whether or not it is also a matter of domestic concern), whether by reason that a failure by Australia to take proper measures for the protection or conservation of the property would, or would be likely to, prejudice Australia's relations with other countries or for any other reason.*

Labor Senator Gareth Evans made these comments about World Heritage properties and Section 6(2) in particular :

*A large number of hurdles have to be overcome before properties can in fact come within the ambit of this legislation.*¹⁶

¹⁶ Senate Hansard, 18 May 1983, page 556.

There would be a real lack of credibility involved in a nation going through the business of purporting to submit to a very august world body some such piece of property as satisfying this description. (Lunar Park or some appropriately decorated Municipal lavatory.)

Quite an elaborate procedure has to be followed in putting in submissions to the inventory operated by the World Heritage Committee.

... although the language is very wide, nonetheless a series of hurdles have to be overcome.¹⁷

It is revealing that none of these 'hurdles' have ever been provided for in legislation. The terms and conditions upon which these areas could or should be assessed have been neglected by the Commonwealth Government to the extent that they are not provided for in legislation.

Section 7 refers to identified property which, if the Commonwealth is it satisfied is being, or is likely to be, damaged or destroyed, the Commonwealth may activate the protective measures pursuant to section 10. This section is based on the corporations power of the Constitution, Section 51(xx).

Section 8 refers to the fact that if an Aboriginal site or any artifacts or relics situated thereon are damaged or destroyed or are likely to be, the Commonwealth Government may activate protection measures pursuant to Section 11. This section is based on the races power of the Constitution, Section 51(xxvi), and is, accordingly, enacted as a special law for the people of the Aboriginal race.

However, the Act was designed to protect only the identified property of World Heritage value. Of course, the type of property referred to above may be protected under totally different legislation, independent of the obligations imposed under the World Heritage Convention, ie : National Parks and Wildlife Act 1975 of Tasmania.

Finally, it is important to emphasise that the identified property referred to needs to be proclaimed as such before the protection measures of sections 9, 10 and 11 can apply.

¹⁷ Senate Hansard, 18 May 1983, page 557.

Pursuant to section 15(1), the Minister shall cause a copy of the Proclamation made under section 6, 7 or 8 to be laid before each House of Parliament within 5 sitting days after the making of the Proclamation. The Proclamation ceases to be in force if this is not done. Either House of Parliament may pass a resolution disapproving of the declaration in the Proclamation. In addition, Section 16 provides an opportunity for the Minister to revoke the Proclamation where there is no longer any threat of damage to, or destruction of, the relevant property. The Minister is not provided with the opportunity to revoke the Proclamation for other reasons such as economic, social or cultural. For example, rehabilitation of a mining site may require blasting and excavation which is detrimental to the World Heritage and values of the area, but by omitting to rehabilitate the site in this manner, there may be a greater degree of damage to the World Heritage values of the area.¹⁸ In addition, the absence of the consideration of economic, social, cultural and community concerns highlights the narrowly focused basis of the Act, ie: solely environmental issues.

Section 9 is one of the three important protective measures available under the Act.¹⁹ The application of section 9 derived from the external affairs power of the Constitution, Section 51(xxix), which allows the Commonwealth to enact domestic legislation to reflect responsibilities and obligations appropriate to an international treaty or agreement. However, sections 9(1)(a) to (g)²⁰ were found to be invalid in the Tasmanian Dams High Court decision (per Brennan, Deane, Wilson, Dawson J J and Gibbs C J).²¹

Dean J stated :

¹⁸ See chapter 8, Management of World Heritage – Bender's Quarry.

¹⁹ The others being sections 10 and 11.

²⁰ Relating to (a) excavation works, (b) operations for recovery of minerals, (c) erecting buildings, (d) cutting down or damaging trees, (e) constructing roads or using explosives.

²¹ Tasmania v Commonwealth (1983) 158 CLR 1.

*... all of the prohibitions contained in paragraphs (a) to (g) (inclusive) of s.9(1) are automatically imposed in respect of any property which is proclaimed by the Governor-General pursuant to s.6(3) regardless of their appropriateness for the purpose of protecting or conserving the property and regardless of whether any relationship at all exists between all or any of the prohibited acts and the circumstances, there is a lack of any reasonable proportionality between the provisions of s.9(1)(a) to (g) and the purpose of protecting and conserving the relevant property. Those paragraphs are not capable of being reasonably considered to be appropriate and adapted to achieving that purpose.*²²

And Brennan J said :

*The fact is that protection and conservation are functions that can only be performed with respect to an individual property; those functions have to be performed according to the condition of the property at the time and with reference to any threat that may then be posed by specific dangers. That fact is reflected in the drafting of the World Heritage in Danger provisions of the Convention (Art.11 cl.4). The difficulty with pars. (a) to (g) of s.9(1) is that they generally prohibit the kinds of acts therein specified whenever done on any property to which s.9 applies or may be made to apply. It is impossible to say that such provisions, would be conducive to the protection and conservation of those properties. They are too wide.*²³

However, section 9(1)(h) was held to be valid because it provided the opportunity for the Minister to prescribe an act which may damage or destroy the property to which the section applied. Thus the Commonwealth Government could, by regulation, prescribe or prohibit such activities as it thought appropriate to meet its obligations under Articles 4 and 5 of the Convention.

Section 10 was upheld as valid in the Tasmanian Dams case. Section 10(2)(a) to (k) was a mirror of section 6(2)(a) to (g). Again, Section 10 was clearly inserted in the Act as part of the Commonwealth Government's objective to increase the likelihood of the Constitutionality of a decision to prohibit dam construction proceeding.

²² *ibid.* at pages 266 – 7.

²³ *ibid.* at pages 236 – 7.

The Commonwealth Legislative Research Service made the following statements about sections 8 and 11 : ²⁴

A majority of the Judges in the Dams Case upheld the Commonwealth's constitutional power to enact sections 8 and 11 under the races power. They held that a law protecting the cultural heritage of a race was a special law for the people of the race. ²⁵

However the actual operation of sections 8 and 11 of the Act were held invalid in the Dams Case.

This was because one of the majority judges, Deane J, found the particular sections and regulations in the Act which relied on the races power were invalid on the ground that they amounted to an unjust acquisition of land by the Commonwealth as they did not confer an immediate right to compensation. ²⁶ *As a result, Deane J's findings combined with the other three Judges Gibbs C J Wilson and Dawson J J (who had found sections 8 and 11 were not valid laws under the races power as they were not special laws with respect to the peoples of a race but were only laws which sought to protect sights for all people) to invalidate the operation on section 11.*

The combining of Deane J who was in the majority with the three minority judges was sufficient to invalidate sections 8 and 11.

MINISTERIAL CONSENT

The following clauses make provision for the Minister to consent to actions which would otherwise be unlawful – section 9(1), 10(2), 10(3), 10(4), 11(1), 11(2) and 11(4).

Section 13 establishes a review system of the Minister's decisions under sections 9, 10 and 11. Section 13(1) provides that in determining whether or not to give consent the Minister shall have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property. Such a provision was inserted to exclude consideration of the economic, social and cultural consequences of consent or otherwise. Thus, hypothetically, if there is even a

²⁴ O'Brien, Sarah, Operation of the World Heritage Properties Conservation Act 1983, Department of the Parliamentary Library, dated 23 March 1983, at page 22.

²⁵ Commonwealth v Tasmania (1983) 158 CLR 1 Mason, pp 159 – 160, Murphy, p 181, Brennan, pp 245 – 6, Deane JJ p 276.

²⁶ Lindell, G J, 'The Corporations and Races Power' 1984, 14 FLR 217.

minuscule damage to the World Heritage values of the area it is irrelevant how, for example, the extraction of billions of dollars worth of gold would benefit the community, state or country. Such a narrowly based restriction inadvertently places an infinite value on all World Heritage areas – isolating them from the interests of the community at large.

Section 13(3) obligates the Commonwealth Minister to inform the State or Territory and to give them a reasonable opportunity to make representations in relation to the matter under consideration.

Section 13(4) requires the Minister to publish in the Gazette, within 7 days, the decision made together with the particulars of the act or acts to which the consent or refusal to give the consent relates. Section 13(4)(b) requires the notice under subsection (4)(a) to be laid before each House of Parliament within 5 sitting days after the decision.

Section 13(5) refers to the Administration Decisions (Judicial Review) Act 1977 and its application to the Minister's decision 'to give or refuse to give consent'. The definition of a person aggrieved by the decision is reasonably broad and designed to allow the various conservation organisations and their representatives to have recognition.²⁷ In addition, section 13(7) provides that any member of the Aboriginal race shall be taken to be a person aggrieved by the decision (emphasis added).

However, it is important to note again that section 13 applies only to decisions by the Minister made pursuant to sections 9, 10 and 11. In short, a review can only take place where the property is both identified and proclaimed. If a property is merely 'identified', the Minister cannot be forced to act to protect the area. A prerogative writ of mandamus (to compel the performance of a public duty) does not lie against the Governor-General to compel the making of a proclamation.²⁸

²⁷ Section 13(5)(a) and (b).

²⁸ O'Brien, Sarah, Operation of the World Heritage Properties Conservation Act 1983, Background Paper Legislative Research Service, Department of the Commonwealth Parliamentary Library, 23 March 1988 at page 32.

ENFORCEMENT AND INJUNCTIONS

The Attorney-General or an interested person may be granted an injunction restraining a person from doing an act which is unlawful (by the High Court or the Federal Court).²⁹ Either Court may grant an interim injunction restraining the person from doing that act pending the determination of the application. The definition of an 'interested person' although not exactly mirroring the definition provided for in Section 13(5) (a) and (b), is very broad and is not limited in any way to those with proprietary rights. The contrast in definitions of 'aggrieved and interested' persons in relation to compensation shows that those with an interest in land which may be adversely affected have to own the land. Having an interest in the land through leasehold or other means is not sufficient. The strict limitations on those who may receive compensation for an adverse effect on their property rights stand in stark contrast to the opportunities granted to those who may wish to seek the prohibition of certain acts within a World Heritage area.

COMPENSATION

Section 17 was inserted in the 1983 legislation to address the concerns emanating from section 51(xxxi) which allows the Commonwealth to acquire property on just terms for any purpose in respect of which Parliament has power to make laws. The original section 17 provided that acquisition of property had the same meaning as section 51(xxxi) of the Constitution.³⁰

The original section 17 was a necessary inclusion because Commonwealth action may have subsequently been regarded as an 'acquisition'. Section 17(2) sets out the terms and conditions upon which the compensation would be paid. The following reviews the provisions of the original section 17.

The relevant provision establishing the mechanism for applying for compensation is section 17(3). An aggrieved person is required to write to the Minister requesting the Commonwealth to pay an amount of compensation specified in the letter. Section 17(4), (5) and (6) provide the mechanisms and timeframe in which the Minister must respond (3 weeks) and, failing a response by the Minister, the

²⁹ Section 14(1).

³⁰ Section 17(1).

procedures necessary for the payment of such compensation in respect of the acquisition as is agreed upon between the person and the Commonwealth and, failing agreement, in accordance with Section 17(5). Accordingly, where an acquisition of property takes place (by the agreement of the Minister or declaration by the High Court) the Commonwealth has to pay an agreed amount of compensation. Failing agreement, if the amount requested is \$5 million or more, a Commission of Inquiry is established to determine the amount (section 17(7)). If the amount is less than \$5 million, the aggrieved person may make application to the Federal Court to determine the issue.

This extensive and intricate procedure was described in a scathing manner by Deane J in the Tasmanian Dams case where he said :

... All they confer is a right to set a procedure in chain. If the Minister contests that there has been an acquisition, the Commonwealth is under no obligation to pay compensation unless and until the claimant has instituted proceedings in the High Court and obtained a declaration that there has been an acquisition. Inevitably, the obtaining of such a declaration will involve the passage of time. ³¹

The payment of any compensation would not be before the expiration of many months and possibly more than a year and, no doubt, substantial expense. Deane J describes section 17 as intrinsically unfair ³² and also

'...the system established by section 17 for ascertaining whether compensation is payable...is quite unacceptable and unfair...' ³³

This unfairness has been addressed in part by the Conservation Legislation Amendment Act 1988.

³¹ Commonwealth v Tasmania, op. cit. page 831.

³² op. cit. page 832.

³³ op. cit. page 832.

THE 1988 AMENDMENTS TO THE WORLD HERITAGE PROPERTIES CONSERVATION ACT 1983

INTRODUCTION

The Conservation Legislation Amendment Act 1988 was passed by Federal Parliament in February 1988. It was introduced and urgently passed through both Houses of Parliament, again for primarily political reasons. These reasons were to ensure that the North Queensland rainforests were adequately protected during the period in which an area which had been nominated for listing by the Federal Government was being considered by the World Heritage Committee. The Queensland Government was intending to build a road through part of this nominated area to facilitate access to forestry operations. The legislation thus broadened significantly the definition of the identified property. The legislation was officially introduced to 'clarify and strengthen' the protection under the World Heritage Properties Conservation Act 1983.³⁴

The editor of the Environmental and Planning Law Journal (Cultural and Natural Heritage) had this to say about the legislation :

*The major amendment relates to the definition of the 'identified property'. That definition has been expanded from the relatively simple criteria that the property forms part of the cultural or natural heritage and is declared by Regulations to form part of that heritage, to include property subject to an inquiry to determine the World Heritage status of the area, to include property subject to World Heritage list nomination, as well as including property which is already on the World Heritage list pursuant to Article 11 of the World Heritage Convention.*³⁵

In essence, the legislation gave the Commonwealth the power to give interim protection and prohibit the road construction by the Queensland Government pending a decision by the World Heritage Committee.

The legislation followed ongoing and vociferous argument between the Queensland and Commonwealth Governments with regard to the intrinsic value of the

³⁴ Senate Hansard, 25 February 1988, page 617.

³⁵ Amendments to the World Heritage Act and Environment Protection (Impact of Proposals) Act, Environment and Planning Law Journal, June 1988, page 175.

rainforest. Hon. Garry Punch, Commonwealth Minister for the Arts and Territories, had this to say during debate in the House of Representatives :

The World Heritage Committee is the appropriate body to determine once and for all whether the North Queensland Rainforests constitute natural heritage of outstanding universal value – for all the world. The Committee will make that determination at its next meeting in November 1988. It will do so with the advice of independent experts who will have inspected and assessed the area and who will have discussed the matter with both the Commonwealth and Queensland Governments. ³⁶

Senator Watson, a Liberal from Tasmania, made these comments about the legislation in response :

However, more importantly, it (the Conservation Legislation Amendment Bill 1988) passes the final and sole responsibility for deciding World Heritage status in Australia to an external body. But this external body is not an elected group. The Bill passes this responsibility to the World Heritage Committee. In so doing, it abdicates Australia's sovereignty in these matters. ³⁷

Conversely some would argue that if Australia did not enter into international treaties it would be abdicating its responsibilities and its sovereignty.

The Conservation Legislation Amendment Act 1988 amended the original Act to set out in more detail when property is to be regarded as identified property, to provide for the appointment of inspectors, to repeal provisions of the Act deemed to be invalid in the Franklin Dams case and added to the compensation provisions of the Act. In summary, it did five things:

1. The Act amended the definition of 'identified property', as defined in section 3 of the original Act. It broadened the definition in the original Act.
2. The Act amended the original Act to make provision for the appointment of inspectors for the purposes of obtaining information concerning the making of proclamations and regulations or for determining possible breaches of the Act.

³⁶ Hon. Garry Punch, Minister for the Arts and Territories, House of Representatives Hansard, 24 March 1988, page 1343.

³⁷ Senator John Watson, Tasmania, Senate Hansard, 15 March 1988, page 767.

3. The Act repealed the sections of the original Act held to be invalid by the High Court in the Tasmanian Dams case.
4. The Act amended the original Act to simplify procedures relating to compensation when the operation of the Act results in acquisition by the Commonwealth.
5. The Act provides that the Environment Protection (Impact of Proposals) Act 1974 does not apply to action taken under the World Heritage Properties Conservation Act 1983, or to any submission by Australia of a heritage property as suitable for inscription on the World Heritage list.

The second reading speech to the Conservation Legislation Amendment Bill 1988 provided :

As noted, the major consideration is the clarification and the strengthening of the World Heritage Act. 'Identified property', the property protected under the Act, is to be redefined to be more in line with the format of the Convention itself. Identified property would be property subject to any of the following:

First, a Commonwealth inquiry to determine whether or not it is World Heritage;

Secondly, a World Heritage nomination by Australia;

Thirdly, World Heritage listing; or

Finally, if it is property which is World Heritage and which is declared by regulation to be identified property.

In other words, the Act would follow the three stages of the World Heritage Convention: identification of property; nomination; and listing. Interim protection would be afforded at each stage. ³⁸

As noted above, the definition of identified property was the main concern of this amending legislation. The amending legislation repealed the previous section 3(2) and inserted a new section 3A which provided for the considerations referred to above.

³⁸ Hon. Garry Punch, House of Representatives, 24 March 1988, pages 619 and 620.

The legislation was introduced subsequent to the High Court case between Richardson v Forestry Commission (hereafter referred to as the Tasmania Forests case) ³⁹, which found that it is constitutionally valid for the Commonwealth to provide interim protection for a property subject to an inquiry being held into its World Heritage values. ⁴⁰ The case is referred to below. ⁴¹

In addition, the previous section 3(2)(a)(ii) is retained in the new section 3A(1)(a)(iv) which emphasises that the regulation or declaration by the Commonwealth Government of a World Heritage area can occur if the property forms part of the cultural and natural heritage.

UNLAWFUL ACTS - SECTION 9

The amending legislation omits section 9(1) and (2) and substitutes the following:

Where an act is prescribed for the purposes of this subsection in relation to particular property to which this section applies, it is unlawful, except with the consent in writing of the Minister, for a person to do that act, or to do that act by a servant or agent, in relation to that property. ⁴²

In effect, this new subsection replaced the former section 9(1)(h) which refers to Acts 'prescribed' as unlawful. The deliberate mention of certain specific acts in sections 9(1) and (2) of the original Act were found to be unconstitutional in the Franklin Dams case. This amendment effectively gives an unrestricted approach to the Minister to prohibit whatever action the Minister thinks fit to prohibit subject of course to the limits imposed by the World Heritage Convention itself, such limits however being very broadly defined. It is a very broad power indeed.

³⁹ (1988) 164 CLR 261.

⁴⁰ See also Bedding, J M and Tsamenyi, B M, "The World Heritage Convention in the High Court: A Commentary on the Tasmanian Forests Case" (1988), 5 Environmental and Planning Law Journal, 232.

⁴¹ See also Bedding, J M, Tsamenyi, B M and Wall, L K, "Determining the World Heritage Values of the Lemonhyme and Southern Forests: Lessons from the Helsham Inquiry (1989), 6 Environmental and Planning Law Journal, 79 and Boer, B, "Lemonhyme Inquiry Act Valid" (1988), Environmental and Planning Law Journal, 173.

⁴² Section 9(1).

COMPENSATION – SECTION 17

The amending legislation repeals the previous section 17 which was severely criticised as being unfair and unjust by Deane J in the *Tasmanian Dams* case.⁴³ However, the new section 17 does not appear to have removed the heavy handedness altogether. Section 17(1) merely repeats the provisions of section 51(xxxi) in the Constitution relating to the acquisition of property on just terms. Section 17(2) provides that the Commonwealth is to pay compensation 'of a reasonable amount' as agreed between the aggrieved person and the Commonwealth. The insertion of the words 'reasonable amount' make the meaning of this section unclear and open to some varying interpretations. Section 17(3) provides that, failing agreement, the person may institute proceedings in the Federal Court. This appears not to provide a right to immediate compensation and, indeed, the Commonwealth Government could easily frustrate payment of the same. The time delay and legal costs are undoubtedly an impediment to justice. The section relates only to compensation for the acquisition of property and makes no reference to compensation for those with other proprietary rights, eg: leaseholders or others with an interest in the land.

This section is in stark contrast to section 19 of the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 of the Commonwealth which provided for compensation to all those people who were prohibited from doing an act prescribed under that legislation and the person who suffered, or would suffer, loss or damage. There is no explanation why the compensation provisions relevant to the prohibition of prescribed activities during the conduct of an inquiry should be any different from those which apply following the conclusion of the inquiry when those same prohibitions apply. The fact that the property was yet to be "identified" adds little weight to the argument that it was not necessary to pay compensation following an inquiry. This is discussed further in chapter 8.

⁴³ Commonwealth v Tasmania, op. cit., 290.

ENFORCEMENT BY INSPECTORS – NEW SECTION 17A, B AND C

The amending legislation gives broad ranging powers to Inspectors who may be appointed by the Minister [section 17A(1)]. Section 17A(2) provides an Inspector may for an eligible purpose :–

- a) enter and search an eligible place;*
- b) take photographs and record occurrences in an eligible place;
and*
- c) inspect, examine and take photographs and measurements of an eligible thing.*

In addition, the Inspector may stop, detain, enter and search any vehicle [section 17A(3)]. However, the Inspector must satisfy the conditions of Section 17A(4) also. The Inspector must obtain the consent of the person in charge or obtain a warrant issued by an eligible judge on the basis that it is 'reasonably necessary'. However, entry is allowable if the Inspector believes on reasonable grounds that it is necessary in order to prevent the concealment, loss or destruction of anything [section 17A(4)(c)(i)] or because of such seriousness and urgency as to require and justify immediate entry [section 17A(4)(c)(ii)].

These are very broad powers and have the power to taint the property owner or manager as a potential criminal. Rather than a warrant specifying entry during reasonable hours, it is authorised to be made at any time, night or day [section 17A(6)(b)].

The new section 17A(10) provides that an eligible place means any land, building or structure, whether or not it is an identified property, but does not include a dwelling house. Again, the reason why the Commonwealth Government considered and included such extraordinarily broad ranging powers is unclear but it may have been a response to the 1983 'spy flights incident' where the State Government denied access to information and the Commonwealth responded by using defence force personnel and aircraft. ⁴⁴

⁴⁴ The Federal Attorney-General, Senator Gareth Evans, authorised the deployment of Royal Australian Air Force jets to fly over Tasmania to gather evidence.

In the case of obstruction of Inspectors exercising their powers, a penalty of \$1000 or imprisonment for 12 months, or both, apply (section 17B).

Section 17C provides for confidentiality such that the Inspector shall not, directly or indirectly, make a record or communicate to any other person any of the information or documentation obtained. In the case of a breach of confidentiality by the Inspector, a penalty of \$1000 or imprisonment for 6 months or both applies [section 17C(3)]. Why there is a differentiation in penalties applicable to obstruction to Inspectors and breaches of confidentiality is unclear. This section provides that the information obtained by the Inspectors is not 'exempt' information for the purposes of the Freedom of Information Act 1982.

MISCELLANEOUS PROVISIONS

Finally, the amending legislation inserts a new section 4A into the Environment Protection (Impact of Proposals) Act 1974 which provides that this Act does not apply to the doing of anything under the World Heritage Properties Conservation Act 1983 or regulations made thereunder. In essence, this means that any action taken pursuant to or under that Act is not subject to environmental impact assessment or a public environmental inquiry under the Environment Protection (Impact of Proposals) Act 1974.

The amending legislation provides greater authority, power and responsibility to enact the protective provisions of the original Act. The definition of identified property has been clarified and broadened, its ability and scope to protect areas considered under threat have broadened and the Government's search and seizure powers have increased substantially. The ability to proclaim regulations to prevent actions that directly threaten, or are considered by the Government to directly threaten, world heritage values, whether or not in a world heritage listed area, is perhaps the most alarming increase in power.⁴⁵

⁴⁵ The Management of World Heritage – Bender's Quarry case study in Chapter 8 reviews the scope of this power.

STATE AND TERRITORY CONSERVATION MEASURES

Although the Federal Government is the State party to the World Heritage Convention, the day to day management and conservation measures are undertaken by the various state and territory governments. The World Heritage Committee prefers that, prior to a listing taking place, a conservation management regime should already be in place.⁴⁶

This invariably is a management regime of that particular state or territory except in the case of Commonwealth territory of course.⁴⁷ In Tasmania, for example, the National Parks and Wildlife Act 1970 provides for State Reserves to be proclaimed and these areas are strictly managed in primarily single use areas. Mining, forestry and productive industries are prohibited in these areas. Recreational use is also strictly managed. It is noted below that before an area is nominated for world heritage in the USA, the areas must already be protected with an appropriate management regime in place.⁴⁸ Such a requirement is not part of Australia's legislative or administrative regime.

Chapter 6 reviews the administrative framework for protecting and managing Australia's world heritage areas. That chapter considers the joint management Councils that exist and how they operate in overseeing the day to day management of the relevant areas.

The relevant conservation legislation in each state and territory establishes various classifications of reserved land. In Tasmania, the relevant legislation is the National Parks and Wildlife Act 1970, Forestry Act 1920, Mining Act 1929, Crown Lands Act 1934, Environment Protection Act 1973 and Hydro Electric Commission Act 1944.

Unfortunately, the Federal Government has previously nominated areas for world heritage listing that do not have an adequate or final and approved conservation

⁴⁶ Operational Guidelines Revised February 1995, paragraph numbers 7 to 22, particularly 21.

⁴⁷ For example, Uluru National Park, Kakadu National Park and the Great Barrier Reef are all managed under Commonwealth legislation.

⁴⁸ See footnote 48; Section 73.7 (B) (1) (iii).

management regime in place.⁴⁹ It is very difficult for the Federal Government to establish conservation management regimes in these areas due, firstly, to the strain it would pose for federal-state relations, and, secondly, due to the questionable constitutional validity of any such regime. Some world heritage areas of Tasmania include private property. Despite the potentially negative impact on the value of these areas, ie: the newly imposed restriction on the use of the land, compensation is not paid or provided for by the Federal Government for a loss of property values. Compensation is only paid on acquisition and this may only occur after legal initiatives in the Federal Court by the aggrieved.⁵⁰

The World Heritage Area Appropriate Boundaries Report, prepared by the Tasmanian Department of Parks, Wildlife and Heritage in June 1990, recommended a further 3,000 hectares of private property for world heritage listing. Again, no consultation or discussion took place with the land owners and if the property was listed, no compensation would be paid. It is interesting that in the USA, the owner of the land must consent to the listing. Failing consent, the land can be compulsorily acquired for fair compensation.

In summary, the Federal Government is required to meet all its real and perceived obligations under the Convention. Clearly, the states provide an integral part in the process of protection and conservation, and particularly, with respect to the management of land in these areas. A more co-operative approach, together with a clear set of legislative and administrative guidelines, would advance the interests of all participants in the protection and conservation of the world heritage areas.

THE UNITED STATES NOMINATION PROCEDURE AND AREAS FOR REFORM IN AUSTRALIA

In comparing the world heritage nomination and listing process in Australia with that in the USA, there is ample evidence to show that the procedures in Australia are in need of reform. There are five main areas of difference between the two countries which point to the need for reform in Australia, namely:

⁴⁹ Tasmania's management plan was not approved and finalised until 30 September 1992, some ten years after the first world heritage area was nominated.

⁵⁰ Section 17, World Heritage Properties Conservation Act 1983.

1. The consent of the owner of the World Heritage area is not required before an area is listed in Australia. The owners are usually State Governments, but can include local government and private property owners.
2. There are no requirements that an appropriate management plan be in place before the area is listed.
3. There are no requirements for the area to have been previously dedicated as an area of national or state significance, ie: National Park.
4. There are no requirements to consult with, or provide compensation to, those with an interest in the land, eg: mining or forest companies, local government, tourism operators, farmers, community groups, etc. (Except where the property was compulsorily acquired, if this can ever be proven.) In the USA efforts by the Government to regulate private property have in some instances been considered by the courts to be a 'taking' and the property owner is entitled to just compensation.⁵¹
5. There is no procedure in place to encourage public input both before the decision and on an ongoing basis, and, further, there is no legislative requirement for the consideration of all the information available, including the economic, social or community consequences of the decision to list.⁵² Currently, under the World Heritage Properties Conservation Act 1983, the Minister is required to consider only the conservation benefits of a decision to nominate an area.⁵³

Although the Australian political and legal processes are different, it is interesting to note that the United States procedures satisfy the above requirements.⁵⁴ The

⁵¹ Rochell, V A, "The World Heritage Treaty as a Means to Federally Regulate Private Property for the Preservation of Cultural and Natural Heritage" 23 (1981), Arizona Law Review, 1033.

⁵² Arnstein, A, "A Ladder of Citizen Participation" (1969), 35 American Institute of Planners Journal, 216.

⁵³ Section 13.

⁵⁴ Code of Federal Register Section 73. Also Title IV of the National Historic Preservation Act Amendments of 1980; Public Law 96-515, Special Note: Section 73.7 provides :-

(B) Identification

(1) Requirements

In order for a US property to be considered for possible nomination to the World Heritage List, it must satisfy the following legislative requirements in addition to satisfying one or more of the World Heritage Criteria (Section 73.9)

legislative requirements for nomination of world heritage areas in the United States sit in contrast to the Australian procedures which rely on the discretion of the relevant Commonwealth Minister for the Environment.

Interestingly, in support of the above, at the 14th General Assembly of the IUCN in 1978, in regard to the legal status of World Heritage areas, the meeting agreed :

The sites will undoubtedly include many previously designated protected areas.

Management of these sites will stress the maintenance of the heritage values, will ensure the continuation of legal protection, and will promote each site as to its significance to each country, its people and the world.

*All sites will have to have strict legal protection and will be owned by Government or a non-government corporation or trust for the long term.*⁵⁵

In Tasmania's case, at least some of the world heritage areas nominated and listed were not previously designated protected areas (some areas were used for timber harvesting) and some of the areas were privately owned and remained so. They were not purchased by the Government.

Interestingly, in regard to the dedication of wilderness areas in the USA, the US Government requires up to ten years of exhaustive checks and assessments of the value of the area in not only heritage terms, but economic, social and community terms.⁵⁶ Each recommendation of an area to be designated a wilderness area shall become effective only if so provided by an Act of Congress.⁵⁷

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- (i) The property must have previously been determined to be of National significance (16 USC 470 a-1). 'National significance' refers to properties designated as National Historic Landmarks or National Natural Landmarks or areas of National significance established by the Congress of the US or by Presidential Proclamation.
 - (ii) The property's owner(s) must concur in writing to the nomination (16 USC 470 a-1).
 - (iii) The nomination document must include evidence of such legal protections as may be necessary to ensure the preservation of the property and its environment (16 USC 470 a-1).

⁵⁵ 14th General Assembly of the IUCN in Turkman, USSR, 25 September to 5 October 1978.

⁵⁶ Wilderness Act 1964 (USA), Public Law 88-577, specifically sections 1 to 6.

⁵⁷ Wilderness Act 1964 (USA), Section 3(b).

CONCLUSION

The legislative framework for implementing the World Heritage Convention in Australia was conceived in a politically and emotionally charged environment at the time of the Franklin dam dispute in Tasmania (1983). The World Heritage legislation was the first legislative act of the newly elected Hawke Labor Government and was enacted to stop the building of the Franklin Dam in south-west Tasmania. The legislation has many inadequacies and the legislative framework is in need of major reform as noted in the previous section.

The rights of private property owners and others with an interest in the land have been inadequately protected by Australia's legislative framework. The power given to the Federal Government pursuant to entering into the World Heritage Convention has enabled it to, at will, prohibit certain productive and non-productive activities without fair compensation. This is a retrograde step in a modern democracy. The Federal Government's ability to act unilaterally without the consent of the land owner and without appropriate protective measures in place before nomination occurs is profoundly disappointing. The legislative framework is designed in such a way as to avoid the consideration by the Federal Government of all the relevant factors that should be involved in any final decision including the economic, social, community and cultural concerns. Currently, the framework only provides for the consideration of the conservation values of the area. It is submitted such decisions should not be reviewed and finalised in a vacuum.

Finally, the legislative framework encourages ad hoc politically motivated decisions. Reform is required to enable a full and comprehensively transparent review of all the relevant factors with input from the public, in an environment removed from politically opportunistic decision-making.

Chapter 6

THE ADMINISTRATIVE FRAMEWORK FOR NOMINATION AND PROTECTION

INTRODUCTION

This chapter reviews the administrative framework that exists in Australia for the implementation of the World Heritage Convention. It explains the background to the problems with this framework and highlights some of the inadequacies of the past. It also points to the fact that politics has been a major consideration in the nomination and management process.

The chapter provides an overview of the constitution of the various Ministerial and Departmental committees that make up, in part, the administrative framework. A chronological review of the changes to these committees and some of the relevant decisions they make is also considered.

The lack of a complete world heritage inventory is an example of the inadequacy of Australia's internal procedural framework and this is considered in the fourth section of this chapter. The failure to meet the requirements of Article 11(1) of the World Heritage Convention since its ratification in 1974 is indeed disappointing. It is acknowledged that the Federal Government has recently attempted to fulfill this international obligation. The fifth section of this chapter considers Australia's representation at the World Heritage Committee and the new ANZECC.

The sixth part to this chapter reviews Tasmania's world heritage area councils and committees. It provides an overview of each of these and their role, function and responsibilities. To obtain a better understanding of the operation and functions of these committees, their terms of reference, guidelines for operation, membership and other matters are set out in the appendix to this thesis.

In the final section, the conclusion, emphasises the need for a more comprehensive administrative framework where a difference of views between the federal and state governments can be accommodated.

BACKGROUND

What has been learnt from the Australian World Heritage listings to date ¹ is that there is very little system, and the listing process runs on a mixture of ad hoc consultation and executive decision-making with occasional concessions to public participation. The latter appears to be solicited only when closed door negotiations at the executive level break down and the Federal Government needs a damage control mechanism to contain the consequences of mushrooming political dissent.

The World Heritage Convention does not regulate the means by which it is implemented in the Australian context. Nor does the Convention offer guidelines for its harmonious implementation in Australia's non-unitary system of federated states, where two levels of government have been assigned distinct spheres of responsibility.

The Convention provides, in article 11(3), that 'the inclusion of a property in the World Heritage list requires the consent of the State concerned'. As mentioned in chapter two, article 34, the 'federal clause', does not specify a system of conciliation whereby State and Territory governments come to an agreement with the Federal Government on World Heritage concerns. The Federal Government may nominate an area unilaterally without the need for any consultation or response from the state. Because of the Convention's inadequacy regarding this matter, it is incumbent on the State party concerned to establish its own legislative and administrative arrangements.

In a similar way to the ratification of all international treaties, the decision to nominate an area for world heritage or not, is made by the Governor-in-Council. This literally means it is a decision of, at least, several members of the Cabinet with no review or approval required by either House of the Federal Parliament or by the Australian state governments. This matter and the need for a review of Australia's treaty-making and ratification procedure is discussed in chapter four.

¹ As at June 1994 Kakadu National Park; Great Barrier Reef; Willandra Lakes Region; Tasmanian Wilderness; Lord Howe Island Group; Australian East Coast (Temperate and Sub-tropical Rainforest Parks); Uluru National Park; Wet Tropics of Queensland; Shark Bay, Western Australia; and Fraser Island.

The decision to nominate or not to nominate, and the administrative procedures by which a particular site is adjudged worthy of nomination, is at the discretion of the signatory state. The Convention merely binds members to '... take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage ...' ²

Heritage objectives, of course, are not pursued in a vacuum. It cannot be expected that the Convention itself develops the framework in which each signatory State reconciles heritage values with important non-heritage values. It is often the case that neither can be fully accommodated without some sacrifice of the other. These issues must be properly addressed if we are to place heritage decisions within a comprehensive land use strategy. In this context, it is the legislative and administrative procedures developed by the parliaments and government departments that are of primary importance in the process.

From a legal standpoint, the Australian Constitution gives the Federal Government exclusive authority to enter into treaties with other States. ³ Recent decisions in the High Court have extended the scope of its implementation powers under such a treaty. ⁴ The result, from a legal perspective, is that the Federal Government can act unilaterally in the nomination of world heritage areas.

From a practical policy standpoint, however, such an approach places enormous strains on the Australian polity. Examples of the tensions that can result from a failure to appreciate Australia's interdependence as a federation of States are the nominations of the Northern Territory's Kakadu (Stage 2), the Wet Tropics area in Northern Queensland and the South West and Western areas of Tasmania.

An extract from the Kakadu submission put to the World Heritage Committee by the then Government of the Northern Territory is instructive. Its length is justified by the insights it furnishes into how the current consultation procedures are applied in practice.

² Article 5(d), World Heritage Convention.

³ Section 51(29).

⁴ As discussed in previous chapters, particularly Chapter 4.

The Northern Territory Government has been provided with specific assurances by the Australian Government that the CONCOM agreement would be applied to any consideration of the listing of Kakadu (Stage 2). This was confirmed in a letter from G. P. Early, Director, National Estate and World Heritage Section, Department of the Arts, Heritage and Environment, ... dated 26 June, 1986. It was again affirmed in a letter from the Australian Minister for Arts, Heritage and Environment to the Northern Territory Minister for Mines and Energy, dated 16 September, 1986. Both letters categorically state that should the Commonwealth Government decide to pursue World Heritage Listing of the former Stage 2 area, the Northern Territory Government would be consulted in accordance with the CONCOM agreement, prior to any approach being made to the World Heritage Secretariat in Paris.

*However, on the same day as the letter of 16 September 1986, the same Australian Minister in conjunction with another Australian Minister issued a joint Press Statement stating that immediate steps should be taken to nominate Stage 2 for inclusion in the World Heritage list. It is understood that the nomination by Australia of Kakadu (Stage 2) was made to the Committee on the day following the Minister's letter of 16 September 1986.*⁵

Despite the undoubted good intention of departmental officials, 'politics' will inevitably be a major consideration in any world heritage nomination and management in the current framework and the outcome often an unfortunate reminder of its pre-eminence in Federal-State relations in Australia. The inadequacy of Australia's internal administrative procedures of review and decision-making highlight the need for urgent reform in this area of world heritage implementation in Australia.

The presence of a number of Queensland delegates during the consideration of the Queensland Wet Tropics for listing by the World Heritage Committee in Brazil in December 1988 was an embarrassment for the Federal Government. Queensland opposed the Federal Government's nomination. The Queensland lobby made representations to the key opinion makers at the meeting. Despite the Queensland lobby's best efforts the Federal Government nomination was accepted and the property listed.

⁵ Northern Territory Government submission to the World Heritage Committee in relation to the nomination of the Kakadu National Park, Stage 2, 1986, at pages 23, 24, obtainable at Tasmanian Forestry Commission Library.

These conflicts among Australian delegates at international gatherings highlight the need for more effective and co-operative internal procedures to be implemented in the nominating process as soon as possible.

ARRANGEMENTS FOR IDENTIFICATION, PROTECTION, CONSERVATION, PRESERVATION AND REHABILITATION

Within the Federal sphere, DEST (formerly 'DASETT') consults extensively with specialist environmental departments and statutory authorities such as the Australian Heritage Commission (AHC), the Australian National Parks and Wildlife Service (ANPWS) (now "ANCA") and the Commonwealth Scientific and Industrial Research Organisation (CSIRO) with respect to advising the Minister regarding the nomination and management of world heritage areas. It is important to note that these consultations are among groups which, although providing valuable information in their area of expertise, contribute little to the wider values of the areas in question, such as the economic, social and community values. The criteria developed to assess nominations by the World Heritage Committee, under its Operational Guidelines, specifically exclude non-heritage considerations. The criteria were '... elaborated to enable the Committee...in evaluating the intrinsic merit of property without regard to any other consideration.'⁶

This kind of prohibition has been incorporated into the Australian enacting statute, the World Heritage Properties Conservation Act 1983, similarly prescribing the Minister's discretion. For example, section 13 provides that the Minister can only consider heritage values in his decision to grant or withhold a consent to vary the land use prohibitions under sections 9, 10 and 11 of the Act.

As discussed earlier, the World Heritage Convention came into force in Australia in 1975 after being ratified on 22 August 1974. But it was not until 1979 that a Special Program Committee of the Australian National Commission for UNESCO was established to advise the Commonwealth Government on matters relating to the implementation of the World Heritage Convention in Australia. Its principal task was to review nominations submitted by State Governments for proposed

⁶ Operational Guidelines for the Implementation of the WHC, revised February 1995, paragraph 6(ii), page 2.

inscription on the World Heritage List and to prepare the brief for Australian delegates attending meetings of the World Heritage Committee.

Membership of the Special Program Committee was made up of representatives from the following departments and authorities :

- Australian National Commission for UNESCO (Department of Education and Youth Affairs);
- Australian Heritage Commission;
- Australian National Parks and Wildlife Service;
- Department of Foreign Affairs;
- Department of Home Affairs and the Environment.⁷

Earlier, however, in May 1977, the Prime Minister, the Rt. Hon. Malcolm Fraser, wrote to all Premiers requesting each to give consideration to nominating places which might be worthy of inclusion on the World Heritage List. As a result of this invitation, the Australian Government forwarded a number of nominations to the World Heritage Committee in 1980 and 1981 for its consideration. One of these included the recommendation of Tasmanian Premier, the Hon. Doug Lowe, for part of south-west Tasmania. The Prime Minister made it clear the normal procedure for making nominations would be that the Premier of a State forwarded a nomination to the Prime Minister with a request that this be forwarded to UNESCO for transmission to the World Heritage Committee.⁸ As can be clearly demonstrated, the policy and procedures were for the State Government to initiate a nomination which would then be approved or otherwise by the Federal Government.⁹

⁷ Membership of the Committee was not open to non-government organisations.

⁸ Background paper by R. MacArthur, Natural Heritage Branch, Department of Home Affairs and the Environment, tabled at 27th Meeting of CONCOM Sydney 19/20 October 1983 available at the Tasmanian Department of Parks, Wildlife and Heritage Hobart library.

⁹ The policy and procedures for nomination continue as follows:-

The nomination is examined in detail by the Australian Committee for the World Heritage Convention, and, if necessary, additional material is sought, either from the State authority responsible for its initial preparation, or from learned people who have expertise in the relevant field. The re-working of the

The Convention's operation in Australia at that time provided for a state or territory Government to take the initiative to nominate whatever it believed was warranted.

The Council of Nature Conservation Ministers ('CONCOM') was established to administer the procedures for World Heritage listing in Australia, particularly the procedures and framework for consultation between Federal and State Governments. The 27th Meeting of CONCOM in Sydney on 19 & 20 October 1983 provided the following :-

Council further noted the recommendation of the Standing Committee that the Commonwealth be asked to provide an assurance that :

- i no areas would be proposed for inclusion on the indicative list of future Australian nominations for the World Heritage List without prior consultation with the relevant State or Territory Government;*
- ii no areas would be proposed for inclusion on the World Heritage List itself without the concurrence of the relevant State or Territory Government;*
- iii any proposals for listing received direct from non-government organisations would be referred to the appropriate State or Territory agencies for consideration.¹⁰*

Following discussion of this recommendation, the Council was unable to achieve consensus regarding its adoption. Accordingly, although the Standing Committee of CONCOM comprising the relevant Departmental officials recommended that consent be required by States before nomination, the CONCOM meeting would not agree. The procedure was finally changed, giving the Federal Government unilateral authority to act with respect to World Heritage listings in 1984. The following is a draft summary of the record of proceedings at the July 1984 meeting.

Noting the advice from Standing Committee concerning the consultative arrangements which had recently been set up between CONCOM and the Special Program Committee for the World Heritage Convention, Council resolved to :

nomination is usually carried out at officer level between representatives of the Australian Committee and State Officials.

When the nomination has been completed satisfactorily, three copies (all with original photographs) are then forwarded by the Department of Foreign Affairs to Australia's Ambassador to UNESCO with a request that he transmits them to the Secretariat of the World Heritage Committee', R MacArthur, *ibid.* page 2.

¹⁰ Agenda item 15(c) available at the Department of Parks, Wildlife and Heritage Hobart library.

1. *Request the Minister for Home Affairs and Environment to urgently confer with the Minister for Education and Youth Affairs with a view to the early establishment of procedures for dealing with the nomination of places in Australia for inclusion on the World Heritage List, as follows :-*
 - a) *The Commonwealth Government to write to the State and Territory Governments inviting them to submit suggestions, with supporting information, for places to be examined with a view to possible future nomination to the World Heritage List.*
 - b) *The Commonwealth Government to arrange for the appropriate authorities to examine the places against the stringent criteria for World Heritage listing.*
 - c) *Any consideration by the Commonwealth Government of the issues to involve full consultation with the State and Territory Governments.*
 - d) *Any suggestions for World Heritage listing brought forward by other than a State or Territory government to be referred, with supporting information, to the relevant State or Territory government for comment prior to examination by the Commonwealth.*¹¹

The Operational Guidelines which were amended in 1987 and again later in 1992 and 1994, are symptomatic of a far deeper problem experienced by the federal and state governments in this non-unitary system of government in Australia. The guidelines provide a cumbersome and ambiguous framework in which the nomination of World Heritage occurs in Australia and it is recognisable that the inadequacy of the framework encourages conflict between federal and state governments and is a further example of the growing shift in the balance of powers between the federal and state governments.

The Operational Guidelines of February 1994 set out general requirements for consultation with the local community in any World Heritage nomination process:

¹¹ Draft summary Record of Proceedings – CONCOM 13th Meeting, 5 July 1984 available from Department of Parks, Wildlife and Heritage Hobart library.

*Participation of local people in a nomination process is essential to make them feel a shared responsibility with the State party [Commonwealth Government] in the maintenance of the site, but should not prejudice future decision-making by the [World Heritage] Committee.*¹²

The Commonwealth Government retains the unilateral decision-making in the nomination and management of the World Heritage area but community consultation is nevertheless essential. The Guidelines do not specify what should occur if the Commonwealth Government is acting contrary to the wishes of the local community.

The revised Guidelines of February 1994 also provide:

*The nomination should be prepared in collaboration and with the full approval of local communities.*¹³

Again, it is unclear from reading the Operational Guidelines what would occur if the World Heritage nomination is opposed by the local community.

THE WORLD HERITAGE INTERIM LIST

The lack of a complete world heritage inventory as required under the Convention is an example of Australia's internal procedural inadequacy. Article 11(1) of the World Heritage Convention states :-

Every State Party at this convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance.

Australia has not prepared and publicised an inventory of property as referred to and only recently, it is understood, a list of cultural items has been completed, although this has not been made available to the author. It is also understood a list of natural areas is currently being prepared.¹⁴ At the World Heritage Committee

¹² Paragraph 14.

¹³ paragraph 41.

¹⁴ Advice and letter from DEST to the author, 30 June 1994.

December 1988 meeting in Brazil, the United States moved that, before considering additional nominations for listing by any member, the Committee should check to ensure that the nominating nation had first supplied to the Committee the inventory referred to in Article 11. It is interesting to note that Mr J Thorsell, who visited Tasmania in January, 1987 to review the status of the World Heritage site on behalf of the IUCN, moved that Australia be exempted from this motion because of its good record on world heritage nominations to that time. Through persistent lobbying from the Australian Federal delegation an exemption was granted.¹⁵

In a report to the October 1984 CONCOM meeting, R. MacArthur of the Department of Home Affairs and the Environment discussed the rationale for Article 11(1) of the Convention and Australia's response to this obligation.

*The World Heritage Committee has requested all state parties provide a list of places which each party proposes to nominate within the next five to ten years. The object of such lists is to give the Committee some idea of the numbers of places, their representativeness, and the balance between natural and cultural nominations envisaged.*¹⁶

Even as early as 1983, the Federal Government department responsible, together with representatives on the Special Program Committee, were seeking advice and information from various conservation organisations on the World Heritage nominations. The following extract from the report of R. MacArthur reviews the process of preparation of an interim list.¹⁷

¹⁵ Personal discussion between the Queensland Chamber of Mines representative at the Brazil meeting in December 1988 and the writer.

¹⁶ R. MacArthur, Natural Heritage Branch, Department of Home Affairs and the Environment, Report tabled at 27th Meeting of CONCOM, Sydney 19/20 October 1983, page 3 available at the Department of Parks, Wildlife and Heritage Hobart library.

¹⁷ *ibid.*, The Australian Heritage Commission has undertaken some preliminary work in conjunction with bodies like the Australian Conservation Foundation in considering places which might form the basis for possible future nominations. On 8 January 1982 all members of Standing Committee were forwarded a copy of places from which possible nominations could be sought.

The research exercise will, of necessity, require consultation with expert bodies such as State National Park services. It must be stressed that nominations must be of 'outstanding universal value' and it is not a case of a place being of unique value to Australia. A nomination must stand up to have international value. For example, the Special Program Committee must consider the value of say an Australian desert against those of the Middle East and central Asia; and Australian rainforest against those of Papua New Guinea and South East Asia; the diverse landscapes of the Australian Alps against those of New Zealand and the countries of South America, etc. pages 3 and 4.

In the middle of October 1983, the Special Program Committee considered a tentative list of places submitted by the staff of the Australian Heritage Commission. After discussing the 'possibles' in some detail, it was agreed that the Australian Heritage Commission would undertake a research exercise to see whether any 'possibles' meet the stringent conditions that might establish whether there is a case for nomination. It is hoped that this technical assessment of significance will enable a tentative list to be available for consideration early in 1984 ...

*... In this context, the Special Program Committee believes that for the foreseeable future, Australia will only nominate a total of some 10 – 12 places, ie an additional 5 – 7 places. Of this total the Committee considers that there should only be an additional 2 places of pre-history significance.*¹⁸

Accordingly, it was clear in 1983 that Australia should use its best endeavours to fulfill this obligation under Article 11(1) and the properties to be placed on this interim list were under serious consideration at this time.

The Chairman of the Standing Committee of CONCOM reported on his attendance at the meeting of the Special Programme Committee of the Australian National Commission for UNESCO on 21 May 1984 and noted the reason for Australia to prepare such a list quickly. In his Report, he stated as follows :—

*The purpose of this indicative list was said to be to ensure that the item was carefully reviewed within the country of the State party nominating it, so that it could be compared with other sites to ensure a higher degree of quality control locally in the first instance. This appears to be a sensible provision.*¹⁹

There was clearly an indication of support for the preparation of this indicative list and the reasons for its existence were well known and understood. However, he went on to say :—

*... advice had been received from the Commonwealth Attorney-General for any areas listed in an indicative list for the purposes of the Convention would be 'identified properties' under the Commonwealth World Heritage Properties Conservation Act 1983.*²⁰

¹⁸ R. MacArthur, *ibid.*, at pages 3 and 4.

¹⁹ *ibid.*, at page 2.

²⁰ *ibid.*, at page 2.

This legal advice illustrates, at least in part, why the Federal Government has only recently attempted to fulfill its obligations set out in Article 11 of the Convention. In essence, section (2)(a)(i) of the World Heritage Properties Conservation Act 1983 provides that identified property is suitable for inclusion in the World Heritage List and the Act further provides that identified property should be protected from acts that might damage or destroy the property. Accordingly, if the property was 'identified property', it would cause substantial divisiveness and antagonism between the Federal and State Governments and productive industries such as mining, forestry and agriculture would be detrimentally affected. The area placed on the interim list would 'automatically' become identified property and any productive recreational or other activity thereon would be subject to prohibition at any time by the Federal Minister for the environment and, quite probably, without adequate compensation being offered by the Federal Government. Confidence in the future for the relevant productive industry would clearly be prohibitive.

The Chairman's Report states :-

It is apparent that there is widespread confusion about the procedures for nomination and dealing with nominations of Australian places for listing ... Procedures need to be established in consultation with the States and Territories and with relevant interest groups.

There is a dilemma about the status implications in terms of Commonwealth legislation in regard to the development in Australia of an inventory of property under Article 11 of the World Heritage Convention. The State and Territory Governments need to be given assurances by the Commonwealth that no action will be taken which confers international heritage status on places within Australia without full consultation and preferably, the concurrence of State and Territory Governments. ²¹

The proposal section of the above Report recommends that the Minister for Home Affairs and Environment be asked to :

²¹ *ibid.*, page 5

*Urge his colleague, the Minister for Education and Youth Affairs, to take no action to establish an inventory of property under Article 11 of the World Heritage Convention until agreement has been reached between the Commonwealth and the States and Territories for procedures on the establishment of such an inventory, and to advise the World Heritage Committee of UNESCO that it is not possible, at present, for Australia to submit to the Committee an inventory of property for Australia in terms of Article 11 of the Convention;*²²

In a letter from the Attorney-General's Department²³ to the Chairman of the Australian Special Program Committee on the World Heritage Convention, the Attorney-General responded to a request asking whether the submission of a planning list of properties to ICOMOS and IUCN would result in the application of the World Heritage Properties Conservation Act 1983 for those properties on that list. The letter in response said :-

Complications could arise if material describing the properties was submitted that made it difficult for Australia to deny the heritage character of the properties.

The final sentence of the letter states :-

However, the States may be sensitive towards the submission of even a planning list if it is prepared and submitted in the absence of consultation with them.

Accordingly, the reason that the interim list was not prepared in accordance with article 11(i) of the Convention was because of the potential risks that would arise for both productive industries and state governments. The Act was drafted in such a way that those properties placed on the interim list pursuant to article 11(i) of the Convention would be suitable for inclusion as an identified property under section 2(a)(i) of the Act. The placing of natural properties on this list which include the sites of productive industries such as forestry and mining companies would create enormous uncertainty and insecurity. In a final analysis, the Federal Government

²² *'and seek assurances from the Minister for Education and Youth Affairs that until procedures satisfactory to the State and Territory Governments have been developed :*

- i) *no areas be proposed for inclusion on the World Heritage list itself without the concurrence of the State or Territory Governments;*
- ii) *any proposals for listing received direct from non-government organisations be referred to the appropriate State or Territory agencies for consideration.'* *ibid.*, page 5

²³ Signed by G.P.M. Dabb for the Secretary, dated 1 June 1984 available from the Department of Parks, Wildlife and Heritage Hobart library.

was aware that the political upheaval would be so severe that it decided not to prepare such a list and to breach the World Heritage Convention.

In a Report of the Meeting of the Australian Special Program Committee for the World Heritage Convention it was recognised that a mechanism must be found which allows investigation of the value of a site prior to any suggestion of commitment by the Government.²⁴ However, an appropriate assessment procedure was not agreed upon and the dilemma facing the Federal Government with regard to the problems emanating from the existence of an interim list were not addressed until later in 1984.

In a letter from the Minister for Home Affairs and the Environment to the Minister for Education and Youth Affairs, the Honourable Barry Cohen, stated :—

The Council also resolved to request me to inform CONCOM of :—

- *the intention of the Commonwealth regarding the preparation of an inventory of property as required under Article 11 of the World Heritage Convention;*
- *the status of any existing list of this type and the implications which it may have in relation to the World Heritage Properties Conservation Act.*

*I propose to inform the Ministers that, in line with the above procedures, the Commonwealth will not lodge any inventory of property without consultation with State and Territory Ministers and that any existing lists of this type have no status whatsoever.*²⁵

The Federal Government chose specifically not to prepare an interim list as provided under the Convention unless consultation (not concurrence) took place with the states. As can be demonstrated, an interim list was not prepared in full and Australia, it can be argued, has been in breach of article 11(1) of the Convention since its ratification.

A report for the Standing Committee of CONCOM in late 1984 stated :

²⁴ Chairman, Dr. J. Baker, OBE., Report of Meeting of ASPC held in the Department of Education and Youth Affairs, Canberra, on 21 May 1984, *ibid.*, page 6.

²⁵ Dated 21 August 1984 available from the Department of Parks, Wildlife and Heritage Hobart library.

*... it (the Standing Committee) feels that procedures for handling nominations for inscription on the World Heritage list should be established before any listing of sites is developed.*²⁶

Despite this advice and information, the meeting of CONCOM on 5 July 1984 agreed that the concurrence of the States and Territories was not necessary, only their consultation.²⁷

REPRESENTATION AT THE WORLD HERITAGE COMMITTEE AND THE NEW ANZECC

Another area of dispute between the federal and state governments relates to the representation of State/Territory delegates at meetings of the World Heritage Committee. The inadequacy of these administrative arrangements was highlighted at the 20th Meeting of CONCOM:

Noting that Senator Evans was prepared to accept State/Territory officials in Australian delegations under specified conditions, Council resolved to :-

- i. re-iterate its view that, as World Heritage areas in Australia were the joint responsibility of the Commonwealth and State/Territory Governments, the level of State/Territory representation at WHC meetings where Australian nominations for World Heritage listing were being debated, should be at least equal to that of the Commonwealth;*
- ii. therefore, request the Minister for the Arts, Sport, the Environment, Tourism and Territories to convey this view to Senator Evans and ask on behalf of CONCOM that he modify the Commonwealth position regarding membership of Australian delegations to enable the relevant State/Territory Minister(s) to be present in an official capacity at all WHC meetings attended by Commonwealth Ministers.*²⁸

Senator Evans' response as Minister for Foreign Affairs was unsatisfactory from the viewpoint of the states and territories. He advised them that it was inappropriate for the states/territories to be represented at Ministerial level, but that they could be represented at World Heritage Committee meetings on the basis that only one

²⁶ Meeting of the Special Program Committee of the Australian National Commission for UNESCO by E. A. Johnstone for the Standing Committee of CONCOM, 24 September 1984, Point 7, page 2.

²⁷ Report of the meeting of CONCOM, 5 July 1984.

²⁸ 20th Meeting of CONCOM, 12 July 1991, Jabiru, Northern Territory, Resolution 283.

representative attend (and pay their own costs). The shift in just a few years of the federal–state balance in favour of the Federal Government is astonishing. The consent of a state/territory government was no longer required, and their representation at World Heritage Committee meetings was strictly limited. This change occurred at a time when the Federal Government made a unilateral decision to blatantly breach the World Heritage Convention to which it was a party and, furthermore, in breach of a specific resolution of the World Heritage Committee, to not accept a nomination for world heritage unless article 11(1) had been satisfied by the nominating party.

Accordingly, the implementation of the World Heritage Convention in Australia has been far less than satisfactory for the states and territories. The federal system of government has operated without the full contribution and consent of the states and territories. The administrative procedures in place in Australia are inappropriate and are a cause of conflict with respect to the implementation of the World Heritage Convention in Australia.

It was also recommended in 1991 that CONCOM and the Australia New Zealand Environment Council ('ANZEC'): operate in a more co-operative way with a view to replacing these two Councils with one – the Australia and New Zealand Environment Conservation Council ('ANZECC'), supported by two separate Standing Committees. The Standing Committees referred to were, firstly, the Standing Committee on Conservation and, secondly, the Standing Committee on Environment Protection.²⁹

²⁹ 20th Meeting of CONCOM, Jabiru, Northern Territory, 12 July 1991:–

'Council consider the integration of CONCOM and ANZEC, and, if in agreement with the proposal, instruct the two Standing Committees to proceed with co-operative development of an appropriate subordinate structure of working groups (or sub-committees, task forces and networks and their corresponding full work programs take account of the views expressed by Ministers.

The Standing Committee had prepared a proposal for CONCOM which stated, recognising the complementary but increasing overlapping roles of ANZEC and CONCOM, a suggested way forward is to replace these two Councils with one – the Australian and New Zealand Environment Conservation Council (ANZECC). This Council would be supported by two separate Standing Committees which would in turn be supported by technical groups specific to one or the other or common to both.'

TASMANIA'S WORLD HERITAGE AREA COUNCILS AND COMMITTEES

The administrative framework for the implementation of the World Heritage Convention in Australia also includes the establishment and operation of Ministerial Councils made up of both Commonwealth and State representatives. With regard to Tasmania, the Tasmanian World Heritage Area Ministerial Council is responsible for co-ordination between the Commonwealth and State Governments.³⁰ It provides advice to both Governments on necessary management plans, management requirements, funding and scientific studies. It requires advice in turn from two further bodies, the Tasmanian World Heritage Area Standing Committee and the Tasmanian World Heritage Area Consultative Committee.

The Tasmanian World Heritage Area Standing Committee is comprised of officials from both Commonwealth and State Governments and advises the Council on all matters relating to the World Heritage area including policies, programmes and funding. It is also charged with overseeing the preparation of management plans, management of the area and scientific studies.

The Tasmanian World Heritage Area Consultative Committee consists of nominees³¹ from both the Commonwealth and Tasmanian Governments and provides advice to the Ministerial Council and Standing Committee either on its own initiative or in response to requests from these bodies. Day to day management of the area is the responsibility of the Tasmanian Department of Wildlife, Parks and Heritage (or other relevant Department).

The following extract from a Tasmanian Legislative Council Select Committee Report on public land use relates primarily to the management of World Heritage areas and summarises the relationship between the Federal and State Governments and the role of each with respect to the administrative framework:

The Tasmanian Wilderness World Heritage area is managed under a joint State/Commonwealth arrangement. This consists of:

³⁰ Two representatives from each government comprise the Ministerial Council.

³¹ 15 members with half the members from each government and a Chairman appointed by the Ministerial Council.

- *a Ministerial Council chaired by the Premier and comprising the Minister for Parks, Wildlife and Heritage and the Commonwealth Minister for the Environment and Minister for Justice. It oversees planning and management.*
- *a Standing Committee of officials from both governments.*
- *a Consultative Committee comprising an independent chair and seven nominees of each government selected to represent a wide cross-section of community interests in the World Heritage area. This committee provides advice to the Ministerial Council.*³²

In regard to the role, function and responsibility of the Ministerial Council, details relating to it, the Standing Committee and the Consultative Committee, set out in the appendix to this thesis, are an extract from the Summary Record of the First Meeting of the Tasmania World Heritage Area Ministerial Council in Hobart on 14 March 1985. The Premier, Robin Gray, Deputy Premier, Geoff Pearsall, and the Commonwealth Minister for Arts, Heritage and Environment, Barry Cohen, were in attendance. Also set out in the appendix are the terms of reference for both the Standing Committee and Consultative Committee and Guidelines for Operation as agreed by the Ministerial Council.

The documents set out in the appendix to this thesis illustrate the difficulty in resolving any contentious matters because the membership of each of the Committees is balanced 50/50 Commonwealth/State and there is no mechanism for dispute resolution. Despite the efforts to maintain a 50/50 balance, the Commonwealth can rely on its purported obligation to fulfill its commitments under the World Heritage Convention and override the State Government. Its negotiating position is somewhat stronger than that of the states for this very reason. As can also be demonstrated, the administrative process in Tasmania is a very flexible process relying on a co-operative approach. The framework for management of world heritage areas in the various States, however, is different. The details and terms of reference applicable to Tasmania are also contained in the appendix.

Finally, a major influence on the appropriateness of the arrangements for good management relate to funding. The majority of the funding for management purposes is provided by the Commonwealth and is made on a periodic basis. The

³² Legislative Council Land Use Committee, A National Challenge, Report No. 6, 1990, page 11.

Commonwealth funding commenced in July 1983 following the High Court decision in the Franklin Dams case. A five year funding arrangement was agreed between the Commonwealth and the State for the period 1987/88 to 1991/92 involving \$11 million from the Commonwealth and \$5 million from Tasmania. The funding was allocated to recurrent expenditure and minor capital works.³³ (The 1992 Management Plan came into being following the expiry of the first 5 year draft plan.) In Tasmania's case, the 1992 Management Plan was subject to a five year funding agreement and the Plan itself may be reviewed every five years. The final funding agreement was negotiated at a Ministerial Council level as was the final Management Plan. The administrative framework relies on a co-operative approach. However, it is inadequate to the extent that there is no provision to negotiate a compromise pending a breakdown in discussions, ie: if negotiations fail, the funding of the management and operations of the world heritage area may fall into disarray. The state government in arguing its case in these meetings relies on the fact that jobs could be lost and the conservation values of the area degraded if funding is not maintained by the Commonwealth at appropriate levels. Such an arrangement is less than ideal.

CONCLUSION

The chronological events providing the background to the administrative framework for World Heritage nomination and management in Australia paint a disappointing picture. The desire of the Federal Government to increase its powers at the expense of the states has been demonstrated, at least in part, by its blatant refusal to meet the obligations of article 11(1) of the Convention. The Government's refusal to fulfill this requirement has occurred at a time when, firstly, it has rejected the need to gain the consent of a state/territory government before listing, preferring to act unilaterally and secondly restricting a state's/territory's representation at World Heritage Committee meetings.

The current structure of the Ministerial council's standing and consultative committees are adequate only when the Commonwealth Government is, firstly, co-

³³ Department of Parks, Wildlife and Heritage, Tasmanian Wilderness World Heritage Area Management Plan, 1992, page 10.

operative with the states/territories and, secondly, is willing to meet the funding requirements for the management of these World Heritage areas. If there is a difference of view between the federal and state/territory governments, then the administrative arrangements are inadequate to resolve it and the resulting dispute becomes one of a political nature. Pursuant to section 51 (xxix) of the Constitution, the Federal Government would win such a dispute and there would be ³⁴ a further shift in the Constitutional balance in favour of the Federal Government.

³⁴ and has been – see chapter 8.

Chapter 7

WORLD HERITAGE WORRIES IN TASMANIA

INTRODUCTION

Why should Tasmania as a state be more vulnerable to having world heritage worries than any other state or territory in Australia? Tasmania has 20% of its land area world heritage listed. This is more than any other state in Australia. As a proportion of its total area Tasmania has more world heritage than anywhere in the world except Costa Rica which has 25%. Although, as has been demonstrated, this nomination and listing process is primarily a responsibility of the Commonwealth Government an understanding of Tasmania's electoral system and Tasmanian politics is important to an appreciation of world heritage in Tasmania.

This chapter reviews the background to the world heritage concerns that have occurred in Tasmania. It explains the political and historical context relating to the current concern and, at times, controversy, in the nomination, listing and management of world heritage.

The chapter commences with an overview of the unique Hare–Clark electoral system and how this has been beneficial to the third force in Tasmanian politics in the last decade – the Tasmanian Greens. Their philosophy and tactics are explained with reference to quotes from, and comments of, some of the leading figures in the Tasmanian conservation movement. A review of the early development of the green lobby is set out in the section following. An explanation of this is helpful in understanding why the green lobby has been successful in achieving much of its stated intentions, including the listing of further areas of world heritage and the introduction of strict management procedures in these areas.

This is followed by an explanation of the Tasmanian Parliamentary Accord and the reasons it focuses on restricting forestry, mining and other productive activities. The impact of this document and the claims of the green lobby are reviewed in the final sections of the chapter. The importance of considering the full range of

consequences resulting from dedicating further areas for world heritage is emphasised. The full range of consequences include the economic, social, community, cultural and other adverse effects of a world heritage listing – not just the environmental or conservation benefits. A conclusion is the last section of this chapter.

THE TASMANIAN HARE-CLARK ELECTORAL SYSTEM

Australia, both nationally and in each of its federated States and Territories, relies on compulsory voting. The mainland States and the Federal House of Representatives (the House of Government), use single member electorates and preferential voting – where 50% + 1 vote is required for election to Parliament. The system favours the mainstream or major parties, and the two party system. However, Tasmania's House of Assembly (the House of Government) electoral system is unique in Australia. It is known as the Hare-Clark electoral system. The system is essentially one of proportional representation (specific to each of the five electorates, not on a statewide basis) and allows a candidate to be elected on only 12.5% of the vote. (Seven members per electorate are elected on a quota of 12.5%). Tasmania's House of Assembly has five electorates (Bass, Braddon, Denison, Franklin and Lyons) which are a replica of the electorates applicable to the Federal House of Representatives. Each of the five electorates returns 7 members, making a total of 35 parliamentarians in the House of Assembly. Tasmania's Hare-Clark electoral system was first used in 1896 in the House of Assembly electorates representing Hobart and Launceston. It was not until the enactment of the Electoral Act 1906 that the Hare-Clark system was applied to all of Tasmania.

Tasmania has a bi-cameral system of Parliament with the upper house being known as the Legislative Council. The Legislative Council has nineteen single member electorates to which the preferential system of voting applies. The voting and electoral system for Tasmania's upper and lower houses is inverted when compared with the Commonwealth Parliament. In essence, the Hare-Clark electoral system used in Tasmania is highly advantageous to a special interest group or third party, relative to the preferential system used elsewhere in Australia. This advantage can

be demonstrated in the policies subsequently implemented by the Government of the day.

This electoral system, *inter alia*, enabled the Green Independents to gain the balance of power for more than two and a half years from 28 June 1989 to 1 February 1992. World Heritage listing in Tasmania was an important goal for the Green Independents and the conservation movement during this period and has remained so since. Having achieved the balance of power and, at minimum, having a political platform provided a helpful mechanism to, *inter alia*, attain this goal. An understanding of the workings and background to Tasmania's unique electoral system is an important ingredient to a thorough appreciation of the achievements of the Green Independents in Tasmanian politics. Further, an understanding will assist in explaining why Tasmania has more world heritage controversy than any other state of Australia and, in turn, adds to the view that Australia has more controversy than any other country in the world.

Traditionally, the Government of the day has been elected with a workable majority and, concurrently, a reasonably large opposition. But this scenario has been based on a two party system. Owing to the advent of a significant third force or third party, namely the Green Independents in Tasmania, this stability in representation can no longer be assumed. Voters have always had a wide choice of candidates under the Hare-Clark system.¹

Despite the wide choice of candidates from the two major parties in the past, recent history has demonstrated that the major parties did not, or perhaps could not, accommodate the vote of the conservation lobby. Both major parties in Tasmania have a limited parliamentary membership representing various backgrounds and a

¹ The Hare-Clark system ensures that nearly three quarters of voters see their first choice elected to Parliament, whereas in a single member electorate system, usually a large proportion of voters do not have their preferred candidate elected (this group of people voted for the defeated candidate or candidates). The Hare-Clark system was designed to give effect to preferences and views of as many electors as possible. Accordingly, it can be demonstrated that, under this system, the majority of electors can be assured the majority of their preferred candidates receive representation in Parliament.

Under the Hare-Clark electoral system in Tasmania, voters can have a wide choice of candidates with a practical minimum of fourteen (seven members for each electorate are successful and both major parties normally endorse a team of seven), and often the choice of 20 or more candidates, in any one electorate.

Further, this system allows for a vote for the party as well as the person or persons within the party. This characteristic of the Hare-Clark system, however, has precipitated vigorous competition between candidates of the same party.

broad range of special interests. But despite this, the conservation lobby has found a niche outside the two major parties. The conservation lobby, represented by the Green Independents, has gained supporters dissatisfied and disenchanted (for various reasons) with the major parties; people looking for a new vision and policies currently not offered or not marketed successfully by the major parties. In many ways this is understandable as the major parties have attempted to represent the majority of voters with a broad spectrum of views. It is submitted that the conservation lobby, being perceived primarily as a single issue group, represents a sectional and distinct interest group which is understandably in the minority.

As electoral success, at least in part, continues for the Green Independents, there is some probability that they may again hold the balance of power and either make a coalition type agreement similar to the Tasmanian Parliamentary Accord of May 1989 or use their influence by other means to achieve their objectives. The direct and immediate impact on World Heritage management and listing was profound following the implementation of this Accord agreement. The Green Independents as a special interest group holding the balance of power had influence disproportionate to their representation in parliament.

THE PHILOSOPHY AND TACTICS OF THE CONSERVATION MOVEMENT

INTRODUCTION

Before assessing the success of the conservation movement in gaining political representation and its impact upon the nomination, listing and management of world heritage in Tasmania, it is helpful to consider the green philosophy and tactics. Understanding green thinking will assist in providing a full appreciation of the reasons for the green lobby's achievements and its likely impact in the future, particularly with respect to the natural environment, world heritage and potential world heritage areas.

THE PHILOSOPHY

*This eco-centric philosophy is what drives the Green movement in Tasmania and has given it a coherence and a focus, which is its strength and distinguishing feature.*²

The philosophy of the green movement in Tasmania is pursued with great vigour – it is, for many, a religion. The following statements are illuminating in that they demonstrate the total commitment to a new spiritual dimension in politics:

*Greens are able to offer, not only a coherent set of solutions to our predicament, but a deep and satisfying new spiritual dimension. Whether this ecological analysis of human life and destiny is described as a new philosophy or a new religion matters less than the fact that their spiritual dimension and the practical manifestation of it are not contradictory.*³

*As she gazed across the lake she seemed to become one with it, both of them seemed to become part of something greater. I can't explain that sensation. Brenda's vision of Lake Pedder was an expression of the divine.*⁴

The sensation experienced, and vision, of Lake Pedder prior to it being enlarged in 1972, was an expression of green eco-centric philosophy. The green philosophy has matured and developed over a long period in Tasmania. It has laid the foundation for an active and thoughtful political action campaign. Sweeping statements that appeal to an inner self are commonplace in the green philosophy. The following is indicative of this :

*Green seeks peace, seeks to bond us to each other, to our fellow creatures and to the planet in a harmonious whole. The universe is the miracle maker and we are but one miracle within its system. Our uniqueness is in the fact that we have a heightened consciousness; that is, a knowing relationship between ourselves and the rest of the miracle, a relationship which we can alter.*⁵

The following is also enlightening:

² Cassandra Pybus, 'The Rest of the World is Watching – Tasmania and the Greens', Pan Macmillan Publishers Australia, October 1990, page 12.

³ Sara Parkin, *ibid.*, page 242.

⁴ Kevin Kiernan, *ibid.*, page 22.

⁵ Dr Bob Brown, *ibid.*, pages 250 and 251.

*The belief is that humans are constituted by [their] ecological relations and so any destruction of these relations necessitates a destruction of a person's self.*⁶

The belief, in the minds of at least some protesters, is that the 'destruction' of wilderness is a destruction of oneself. The incentive to leave the natural areas of Tasmania untouched is, accordingly, quite high. The following statements relate to the impression of two authors in regard to the philosophical basis of greens generally, but more particularly the German greens:

We feel that deep ecology is spiritual in its very essence.

*When the concept of the human spirit is understood in this sense, as the mode of consciousness in which the individual feels connected to the cosmos as a whole, the full meaning of deep ecology is indeed spiritual.*⁷

The desire to 'save' Tasmania's natural untouched areas is understandable. The objective for the green lobby is that it is not simply good for Tasmania's environment, it is necessary for the future of the lives of all Tasmanians. The 'saving' of wilderness becomes the reason for living. To save wilderness is to save themselves. This observation reveals the all or nothing approach to defending wilderness.

Because of their peculiar value system or world view, many elements of the green movement do not respect the existing socio-economic norms. Many in the movement have a pantheistic world view.⁸ An understanding of these central tenets of the green philosophy is necessary to comprehend the reason they pursue with such vigour the protection of world heritage and the natural environment. It is also evident in the green lobby's strategy and tactics.

*All native forests and the wildlife that inhabits them have a right to exist, irrespective of whatever 'objective' or 'scientific' values may or may not have been assigned to them by the human race.*⁹

⁶ Ian Watson, *Fighting Over the Forest*, Sydney, Allen and Unwin, 1990, page 131.

⁷ Charlene Spretnak and Fritjof Capra, 'Green Politics, the global promise' Paladin Crafton Books, 1985, page 50. Charlene Spretnak holds degrees from St. Louis University and the University of California, Berkeley. She has been active in the feminist, peace and ecology movements.

⁸ The doctrine that identifies God with the universe and as being part of the universe – all is one, all is God.

⁹ Geoff Law for the Combined Environment Groups submission to the 'Forests and Forest Industry Strategy', Hobart, 21 August 1990.

The right to exist concept for all native flora and fauna would be profoundly opposed by those in the productive industries and perhaps many others. The disregarding of society's values is evident in this statement. There is an implication that the governing authorities may never be respected.

The following observation was made by a fellow 'green' about Dr Bob Brown's approach to protecting and preserving wilderness.

*But in Bob Brown's notorious 'intransigence' his refusal to negotiate compromise, the eco-centric vision is quite overt. He will not compromise because human expedience has no place in the process of defending wilderness.*¹⁰

The willingness to be dismissive of the role of human beings and governing authorities is demonstrated in the following statement.

*The Wilderness Society ... has called for the removal of dams, roads and introduced fish, an end to track construction, and an end to detailed map production, and more ... Yet it is not primarily the interests of the Tasmanian people that the Wilderness Society is seeking to promote ... it is an unequivocal affirmation of the eco-centric principles central to any longer term 'greening'.*¹¹

The rights of nature, as opposed to people, it would appear have become pre-eminent in the minds of many conservation activists. In light of this belief, the fervour for removing natural places, and world heritage in particular, from human interference is placed in perspective. The quest by the conservation lobby for additional World Heritage areas is a quest for the ultimate in protection for the natural environment.

Accordingly, the conservation movement's definition of what is in the public interest becomes critical. Because Australian industry relies heavily on natural resources, the corresponding environmental law relative to resource management and the protection of the public interest needs to be addressed. If one's definition of what is in the public interest is at variance, then the extent of environmental protection will be commensurably different. Governing authorities are placed in the dilemma of deciding which value-system should apply in their jurisdiction.

¹⁰ Cassandra Pybus. 'The Rest of the World is Watching - Tasmania and the Greens', Pan Macmillan Publishers Australia, October 1990, page 64.

¹¹ Marion Wescombe, *ibid.*, page 187.

Notwithstanding the fervent beliefs of the conservation movement, it is an undeniable fact that the community as a whole today has placed a far higher priority on environmental protection and conservation measures than some twenty years ago. The conservation lobby has been instrumental in focusing public opinion on environmental issues. Conservation issues have received far more attention and become a high political priority in recent decades. The call for the listing of further world heritage areas in Tasmania reflects this trend.

THE TACTICS

Traditionally, the green movement in Australia has been focused on protecting and preserving natural resources, and thus having a direct impact upon the activities of productive industries such as forestry, mining, agriculture and fishing. The green movement's strategy and tactics have been summarised as follows:

[the greens in redeveloping their politics] ... must develop counters to the conservative forces that operate upon them : they must make alliances with groups such as aborigines, the unemployed, gays who, by dint of their socially marginal position, are bound to radical politics ... to this day the Tasmanian green movement prefers images to words to argue its causes, a disposition wholly consistent with its origins in an autistic society. ¹²

This statement is a very specific confession of the strategy of the green movement. It boldly accepts that it is not a mainstream movement, but a movement that exists on the fringe, and a group that can improve its effectiveness by making alliances with other marginal groups in the community – which are bound to radical politics.

In addition to having an alliance, Green lobby activists have assisted these groups by providing resources, training and help to build their campaigning skills. The force of the alliance is well evidenced.

¹² Richard Flanagan, *ibid.*, page 205.

*At Salamanca, lesbians and gays were supported by Green activists who provided the expertise and resources which helped to make the action a success. Protest skills learnt in the forests of the south-west were passed on to a new generation of urban-based activists with a new cause – the cause of lesbian and gay rights. But links between Green and gay, solidified at Salamanca, were to be tested within the next few months, as homosexuality moved from its marginal position in Tasmania's politics to a position of pivotal importance.*¹³

The link between the green activists and these other groups is well documented.¹⁴

Mr Richard Ledger, Acting Director, The Wilderness Society, said in the October 1990 Wilderness News newsletter of TWS :

... consequently the [Wilderness] Society has to maintain its extreme attitude. Without us pushing the agenda, the middle ground, which the politicians are always seeking, will result in incremental destruction of the environment ... the need to be involved in the development of new attitudes toward the natural environment to make conservation the dominant goal of our society, not maintenance of an economic system which has a proven track record of environmental destruction.

The strategy and tactics of the green lobby have been effective and successful. The success has been achieved with the aid of a sympathetic media. Only recently in Tasmania The Wilderness Society supplied the media with television quality video of its 'protests' in a remote area of Tasmania's forests; thus saving time and costs for the media. This direct approach fits with the green lobby's belief that images and pictures are very effective in influencing public opinion. Nevertheless, the

¹³ Rodney Croome, *ibid.*, page 109.

¹⁴ The following list of quotes provides evidence of this link:-

'The lesbian and gay community has learnt that as long as homosexuality is at the centre of Tasmanian politics, it must work hard to direct the debate by being visible, vocal and determined', page 111;

'What lies beyond all these factors is an ongoing and radical ferment in Tasmanian society which has created a new climate for progressive change. It is the same ferment which has thrown up a militant aboriginal movement and, of course, an immensely successful Green movement', page 113;

'In particular, for all the resources, inspiration and expertise the Green movement has provided lesbians and gays in Tasmania, the parliamentary wing of that movement, since the signing of the Accord, has not taken up lesbian and gay issues with the enthusiasm we have come to expect of green parties in other places', page 115; and

'The Greens, the ideology and deep ecology and fear of anthropocentrism must be addressed if the dehumanising potential of these ideas is not to undermine a cohesive social justice agenda. The Green movement must make the connection that those who incite hatred against lesbians and gays are those who woodchip our forests', page 115, Pybus and Flanagan, 'The Rest of the World is Watching – Tasmania and the Greens', Pan Macmillan Australia, October 1990.

conservation movement has also made substantial achievements in directing and steering the political agenda by the clever use of language.¹⁵

EARLY DEVELOPMENTS – THE UNITED TASMANIA GROUP AND THE WILDERNESS SOCIETY

INTRODUCTION

The conservation movement's impact on expanding the area of Tasmania dedicated to World Heritage has been profound. Since its inception in the form of the first green political party in the world, the preservation of our natural areas has been a top priority. The following reviews the birth and infancy of that political party. It also considers the transition of this party into a lobby group known as The Wilderness Society which had for many years a predominant aim – the protection and preservation of the Tasmanian wilderness World Heritage area. This objective resulted in the most bitter and divisive environmental dispute in Australian political history – the 1983 Franklin Dam dispute.

THE UNITED TASMANIA GROUP

Tasmania can either boast or regret the fact that it was the home of the first green political party in the world – the United Tasmania Group ('UTG').¹⁶

¹⁵ The following quote is from an article entitled the Tarkine Wilderness, by Bob Brown. It is an example of the clever use of language:

'Across the Arthur River Gorge and one hundred metres above our heads, a row of giant eucalypts suddenly erupted. We looked up astonished, as leaves, twigs and branches burst out into the sky, the treetops roaring and bending over towards us, where, seconds before the air had been still. After a brilliant hot day in which we walked in the eastern edge of Tasmania's Tarkine Wilderness, this storm front rolled in led by a brooding grey bank of clouds and followed by a downpour. The squall came from beneath the black storm as, suddenly, the massive volume of rain displaced the air like a thundergod's foot on a bellows. The effect was explosive and short-lived.

But a more destructive storm still rages in the Tarkine. It is powered by a man-made forest-buster called cable logging.' Wilderness No 123, August 1991, pages 22 and 23.

¹⁶ The New Zealand Values Party was founded on 30 May 1972 and can claim to be the world's first national green political party.

It was founded just shortly after the United Tasmania Group, which was formed on 23 March 1972. One of the factors that led to the formation of the New Zealand Values Party was a campaign in 1969 to save Manapouri Lake on the South Island of New Zealand from a hydro-electric development. This brought the environment/development debate to the fore.

Further to this, those who opposed the Vietnam war and the French nuclear weapons testing program in the Pacific were attracted to this green party. The green political party had policies which were very directly focused on the environment.

The Lake Pedder Action Committee ('LPAC') was formed in April 1971 to oppose a Tasmanian hydro-electricity development which included the enlargement ('flooding') of Lake Pedder in south-west Tasmania. Ten years later this area was nominated by the Australian Commonwealth Government, and with the agreement of the World Heritage Committee, placed on the World Heritage list. The LPAC, however, was formed at a meeting organised and attended, primarily, by members of the Hobart Bushwalking Club. The LPAC failed to stop the hydro development proceeding but this resulted in the formation of a political party – the United Tasmania Group ('UTG').

The UTG was formed at a meeting of the LPAC on the 23 March 1972. The meeting agreed to the following resolution :

*In order that there is a maximum usage of a unique political opportunity to save Lake Pedder, now an issue of national and international concern, and to implement a national, well-researched conservation plan for the State of Tasmania, there be formed a single, independent coalition of primarily conservation-oriented candidates and their supporters.*¹⁷

Accordingly, for the UTG, the Lake Pedder issue was merely the catalyst to demonstrate, protest and espouse its new-found philosophy. The UTG contested 9 State and Federal parliamentary elections between 1972 and 1977. The most successful electoral result for the UTG was in 1972 when it obtained 3.9% of the total State vote and approximately 7% in the southern based electorates of Denison and Franklin. Both Denison and Franklin include, in part, the City of Hobart, Tasmania's capital and largest city.¹⁸ The UTG stood 12 candidates in 4 different electorates during the 1972 election. The UTG fielded 43 candidates between 1973 and 1977. Even with Tasmania's Hare-Clark electoral system, which requires a

The party contested a number of elections in New Zealand, the most successful of these being in 1975 when they held an average 5.2% of the nation-wide vote – contesting all electorates. The greens had a declining support base from 1975 and in the 1981 and 1984 elections gained an average of only 2% of the national vote.

The New Zealand greens membership has dwindled significantly, into the hundreds rather than thousands, according to Sara Parkin in 'Green Parties: An International Guide' 1989.

¹⁷ Sara Parkin. 'Green Parties – An International Guide', 1989, and Rick Henry, 'A History and Critical Analysis of the controversy concerning the Gordon River Scheme' in Pedder Papers, page 23.

¹⁸ *ibid.* and Pamela Walker – 'The United Tasmania Group – An Analysis of the World's First Green Party', Pedder Papers, May 1987.

candidate to receive only 12.5% of the total vote to be elected, the UTG was unable to win a seat.

During the 1972 campaign both the Tasmanian Liberal and Labor Parties maintained that the Lake Pedder power development was not to become an electoral issue. Conversely, the UTG maintained it was an election issue. However, despite the debate continuing, the dam was built and the lake enlarged several months prior to the election. Following the Lake Pedder debate and the vociferous and active campaigning over several years by the UTG and others, and despite their apparent defeat, there was an increased environmental consciousness not only of Tasmanians but of Australians also.

Further, according to some sources,¹⁹ the UTG was largely responsible for the overthrow of the traditional and politically conservative executive of the Australian Conservation Foundation ('ACF'). The ACF was established in 1965 to perform functions similar to that of the National Trust. The National Trust's aims include conservation of our structural heritage, whereas the ACF's aims included conservation of the country's natural and environmental heritage. The take-over occurred in 1973 and the ACF became more of an active lobby group on issues relating to both the built and natural environment.²⁰ This special interest group, the UTG, formed a political party upon losing a dispute with the Government of the day. The loss strengthened its determination to remain politically active.

The UTG was the birthplace of much of the rationale, philosophy and spiritualism behind the existing green movement. According to the late Dr Richard Jones, the founder of the United Tasmania Group, the implementation of this philosophy should occur, to a significant extent, with the full force of the bureaucracy.

¹⁹ *ibid.* and Pamela Walker - 'The United Tasmania Group - An Analysis of the World's First Green Party', Pedder Papers, May 1987.

²⁰ It is interesting to note that the Australian Conservation Foundation and the Tasmanian Conservation Trust were in existence well before the UTG and yet the UTG was the first political vehicle for any green movement anywhere in the world.

To the extent that we fail to persuade people to decide to change their way of life, give up unnecessary environmentally damaging material goods, to that extent there must be restrictions imposed by law and policed by force to ensure that the goods they 'want' are not available to them. ²¹

The UTG formulated a new philosophy and perspective. This was demonstrated, also, by the fact that the membership of the failed UTG – failed in the sense of lack of success in gaining representation in the Tasmanian Parliament – were instrumental in the formation of the Tasmanian Wilderness Society, now known as The Wilderness Society. ²²

A PRESSURE GROUP OR A POLITICAL PARTY ?

The formation of the UTG can fairly be described as the first overtly political act which thrust the 'environment' issue to the front of the Australian political agenda. The mere presence of the UTG, in contesting seats for election, effectively and immediately blurred the traditional distinction between pressure groups and a political party. The first seeks to influence key decision and opinion makers, whereas the second seeks to be the decision and opinion maker. The UTG tried to do both but succeeded only in the former. Conversely, the Tasmanian Green Independents, established in the period following the May 1989 election, supported by the green movement, have succeeded in both aims. The traditional features of a political party include broad aims, policies and platforms which may be applied in the Parliamentary process, whereas a pressure group, by its very nature, has a 'special interest'. The UTG in its platform referred to the need for a focus on global issues whereas the special interest group, the LPAC, focused on very specific environmental issues, such as the 'saving' of Lake Pedder. During the period of the Tasmanian Parliamentary Accord the Tasmanian Green Independents did, to a large extent, have the ability to set the political agenda. They held the balance of power where they could both influence the policies of the Government of the day and the opposition party and, contemporaneously, have their own policies implemented through the Parliamentary process. It is submitted, however, that both the UTG and

²¹ 'The Rest of the World is Watching', 1990, at page 38.

²² The Wilderness Society is one of the largest and most active green lobby interest groups in Australia.

the Green Independents aim to serve two purposes. Firstly, they aim to be an effective special interest or pressure group and, secondly, to act as a political party.

THE UTG AND THE CURRENT GREEN POLITICIANS

The UTG were, and the Green Independents are, a political party, part of the green lobby, and also a pressure group.²³ The functions they performed to satisfy their pressure group status included the providing of services and opinions for their members or supporters and acting as information and public relations organisations.

The term 'green movement', used in a generic sense, refers to a special interest group similar to pensioners, consumers, teenagers, etc. A special interest group is often unorganised, whereas a pressure group is generally organised, at least to some degree. The green movement, however, is viewed as much more. The term is used to refer to the collective grouping in the community that is seeking to bring about major changes to the social institutions and value systems as we currently know them. As Roberts says, a movement generally 'attracts large mass support' ... 'They are distinguishable from pressure groups because of the fundamental nature of their aims, their lack of reliance on a single organisational base, and their disregard of subtle political tactics'. He adds: 'They differ from political parties because they do not always seek to exercise the functions of government ... yet they are more permanent than a mere crowd, and more purposeful than an unorganised interest'. Clearly, the UTG were, and the Green Independents are, more than just a movement.²⁴

When the LPAC formed the UTG, it lost some of its ideological quality but gained a sharper political profile and embraced a more deliberate and sophisticated set of political tactics. Correspondingly, the foundation of the Green Independents caused a reduction in the green movement's ideological focus and quality – it became a

²³ The word lobby when used as a verb means 'to attempt to exercise influence on legislators; an attempt to persuade or coerce them into taking some decision favourable to those lobbying'. Geoffrey K Roberts, 'A dictionary of political analysis', Longmans, 1971, page 115.

²⁴ *ibid.*, Roberts' other views on a movement are as follows: 'A major feature is their possession of some very basic common purpose, or even ideology, which in turn generates a strong sense of group identity, and may encourage the emergence of charismatic leadership. A movement may transcend existing divisions of social class, religion, party affiliation and even nationality.'

The green movement fulfills all of these characteristics and its charismatic leader in Tasmania from the mid 1980's to 1993 was Dr Bob Brown.

political organisation and, accordingly, more pragmatic. There was less room in the organisation for radical ideologies.

It is understandable that special interest groups with an established political arm have been politically naive, with limited knowledge of the systems of Government. However, over the past two decades, for the green movement, specifically in Tasmania, the naiveté has faded as the understanding has grown. Further, the understanding has matured to such an extent for the Green Independents and specifically their former leader, Dr Bob Brown, that he was recognised as one of the most astute and able politicians in Australia.²⁵

The Green Independents appear to have succeeded in achieving much of their stated agenda throughout the two and a half years they held the balance of power in Tasmania.²⁶ They did this in part by regularly and constantly keeping the Government and its bureaucracy responding to their demands. The Government expended valuable time and resources defending the status quo, leaving little time for its own thoughtful reform and policy development.

The following statement from Branching Out with the Wilderness Society, Inc., a Tasmanian campaign newsletter, illustrates the intensity and fervour of efforts made to further the aims of the conservation lobby:

*At the time of writing, the final boundaries of the World Heritage nomination are still under intense negotiation between the Independents and the Government. Senator Richardson has been and gone today: Thursday 24 August 1989 – an indication of the speed of decision making. Taking part in discussions with the Premier, various Ministers, Departmental heads, with Bob Brown as an 'observer'...*²⁷

The impact of their actions and activities in the nomination listing and management of world heritage was clearly evident.

The change in thinking from the early 1970's to the early 1990's could fairly be described as staggering. There has been a significant change across a broad range

²⁵ Dr Bob Brown was The Australian newspaper's Australian of the Year in 1982.

²⁶ From 28 June 1989 to 1 February 1992.

²⁷ Branching Out with the Wilderness Society, Inc., a Tasmanian campaign newsletter, September 1989.

of issues and areas of living including the legal order, concepts of political legitimacy, economics, science, our cultural and social behaviour, and the standards and values applicable to the people we live with and the world in which we live. The following statement about perceptions and the environmental movement is revealing :

*The way the environment is perceived is critical to the way it will be either used or, as is a valid option today, left alone. People consider their environment is extremely integral in decisions made about the environment. It is, therefore, of great interest to environmentalists since their aim is to alter people's perception of the environment in order to see their cause succeed. Moreover, fundamentally changing the way people perceive the environment represents a move towards the establishment of a new paradigm. Incorporated within a person's image of the environment are also constructs of how society should function.*²⁸

Success was achieved in changing the political agenda in Tasmania. It is in this respect that the conservation lobby has proved itself proficient over the past two decades. If the changing of the political agenda was the yardstick by which we measured the success of political parties or special interest groups in Tasmania, the conservation lobby and their Green political wing, have achieved a substantial degree of success. The growth in social consciousness and public concern about Lake Pedder, the Franklin River and Tasmania's World Heritage areas provided the catalyst for the beginning of the phenomenal growth in Australia's environmental consciousness.

THE WILDERNESS SOCIETY

*The Wilderness Society is an advocate for places and their inhabitants that can't speak for themselves. That is why we have put the protection and rights of habitats above the pleasure pursuits of human beings within wilderness areas.*²⁹

The Inaugural Meeting of the Tasmanian Wilderness Society was held on 22 August 1976. Nineteen of the 23 people present were UTG members, while the remaining four were from the Tasmanian Conservation Trust. The growth and

²⁸ Jennifer Sargent. Extract from the Australian Environment Movement and the New Politics, 1991, page 16, a paper in partial fulfillment of BA Hons NSW.

²⁹ 'Branching Out', with the Wilderness Society, Inc., Tasmanian campaign newsletter, June 1990.

success of the Tasmanian Wilderness Society can certainly be attributed in large extent, particularly in its early phase, to the UTG.

The Tasmanian Wilderness Society's initial and primary purpose was to preserve Tasmania's natural environment and, in particular, South West Tasmania, from further development and, specifically, another hydro-electric scheme, the Gordon-below-Franklin power scheme. Bearing in mind that The Wilderness Society was established just over 5 years prior to the initial construction phase of the Gordon-below-Franklin dam, the conservation movement was well prepared for the battle ahead.

The Tasmanian Wilderness Society was led in its early years by its Director, Dr Bob Brown, who had contested a number of elections for the UTG and was formerly involved in the attempt to stop the Lake Pedder power development project.³⁰

The Tasmanian Wilderness Society changed its name in the mid 1980's to 'The Wilderness Society' and it now has retail outlets in all of Australia's capital cities and numerous other places.³¹

³⁰ The following extract explains (in part) the role of the Director of The Wilderness Society:

'TWS upholds a policy of having a non-hierarchical structure and therefore the Director does not have sole power to appoint or dismiss. The decision is instead made by committee who review and appoint jobs. Additionally, the Director has no decision making initiative. The Director can only act upon decisions already made by consensus at either the bi-annual national campaign meetings or at campaign base meetings held twice monthly. The Director's role then is to be:-

1. the national spokesperson for the organisation;
2. director of campaigns;
3. oversee campaign operation;
4. directing the operation of national campaigns;
5. directing the national strategy;
6. responsibility for forward planning national lobbying; and
7. inter-conservation group lobbying at national and peak council meetings.

The Director is accountable to the national membership, the bi-annual national campaign meetings and the bi-monthly campaign base meetings.', source - Wilderness, No. 116, September 1990, page 49.

³¹ The similarities and differences between The Wilderness Society and the Australian Conservation Foundation are demonstrated below.

'... The ACF and TWS are two of the most prominent environmental groups in Australia. They have the largest memberships and administrative networks in comparison to environmental groups of Australian origin (outside the World Wildlife Fund for Nature, Australia).'

Its widespread success is reflected in the words of Alec Marr of the Australian Conservation Foundation who stated :

But 1989-90 will also be remembered for the declaration of the Douglas-Apsley National Park, the culmination of a 12 year campaign by conservationists, and the extension of the world heritage area by 600,000 hectares, a fantastic achievement. ³²

It is interesting to acknowledge the fact that even the conservation movement itself saw its achievements as being quite extraordinary.

The on-going and regular public conflict on environment/development matters has enabled the conservation movement to maintain its support base. Because of a somewhat flexible system of Government, its membership has had an ability to contribute by way of consensus. ³³ But it seems that with the more serious economic problems of the 1990's, such as high unemployment and low employment prospects, the ability of the conservation movement to achieve its objectives will become more difficult.

The conservation lobby has disseminated its concerns through mass media, the schools ³⁴ and the power base of its supporters at a Tasmanian, national and, sometimes, an international level. It has, accordingly, won important concessions from the governments of the day which in many cases have been contrary to the economic interests of big industry. In this respect, industry and big business can only blame themselves primarily because of their refusal to be active in the conservation 'arena' and more particularly the conservation debate. During the 1970's and 1980's they were regularly and consistently reactive rather than

'Unlike the ACF, participation rights are extended indiscriminately and all contributions are given equal consideration.' Extracts from the Australian Environmental Movement and the New Politics, Jennifer Sargent, 1991, page 61, in partial fulfillment of BA Hons.

Today, TWS has an approximate budget of \$1.417060 million and the ACF an even greater one of \$2.775 million.' (Wilderness, No. 116, September 1990, page 11.)

³² The Wilderness Society newsletter October 1990.

³³ Dr Brown made these remarks about the need for a Constitution for the Society on the 15th anniversary of the Society:

The Wilderness Society as such was further underway with a committee meeting in the Tasmanian Environment Centre on Saturday 22 August (1976) where we adopted a constitution (fortunately ignored ever since, it even set quorums!)' Wilderness No. 116, Volume 11, No. 7, 1990, Page 11.

³⁴ According to The Wilderness Society, its first educational kit 'Wilderness - the original and best of planet earth' is used in over 35% of Australian secondary schools. It's wilderness education program is based in Melbourne.

proactive. As a result of the conservation lobby's efforts through the media and the public, the major political parties have attempted to implement green policies as part of their own platform. Accordingly, the pressure from the conservation lobby has been felt and many of their objectives have been achieved.

With respect to securing additional World Heritage areas in particular, it is illuminating to read The Wilderness Society newsletter of October 1989 :

If somebody a year ago had suggested we go for double or nothing on our current World Heritage area, who would have risked it? If somebody a year ago had said this year we would be 50% closer to achieving the optimum boundaries for the proposed Western Tasmania National Park (WTNP), who would have believed them?

Well folks, both the above have happened. Tasmania's World Heritage wilderness has doubled from 10% to 20% of the State and we only have half a million hectares to claim before the optimum boundaries of a WTNP is a reality.

*In terms of the area, the new World Heritage nomination for Western Tasmania is the biggest step forward in a long-running battle to protect Tasmania's wilderness. Over 600,000 hectares of wild country have been added to the existing World Heritage area of 750,000 hectares.*³⁵

The conservation lobby's objectives are clear with respect to world heritage listing. The Wilderness Society, as recently as 19 January 1994, claimed an additional 320,000 hectares to the existing 20% of Tasmania classified as world heritage.³⁶ The Hon. Ray Groom, MHA, Premier of Tasmania, in response, described the proposal as 'absolute lunacy'. The Premier said he had written to the Prime Minister 'calling on him to reject the proposal'. 'The cost to the Tasmanian economy would be 2000 jobs and more than \$100 million a year ... the net result would be the effective closure of the Tasmanian mining industry within ten years.'³⁷ Although this statement may be somewhat exaggerated the Wilderness Society proposal could be fairly described as an ambit claim and is consistent with

³⁵ Geoff Law ACF Campaign Officer, The Wilderness Society, newsletter, Hobart, October 1989.

³⁶ Reported widely in the Tasmanian media, including front page Mercury, Advocate and Examiner newspapers, 20 January 1994. This would have increased the world heritage area from 1.38 million hectares to 1.7 million hectares.

³⁷ Premier, the Hon. Ray Groom M.H.A., media release, 19 January 1994.

the Society's strategy and aims. The proposal remains with the Federal Government for consideration.

THE FIRST WORLD HERITAGE NOMINATION AND THE FRANKLIN DAM DISPUTE

The Franklin Dam dispute was an unprecedented success for Tasmania's, and indeed Australia's, green lobby. It was similarly the most politically divisive and emotional environmental dispute in the history of Australian politics.

*To say that it [the Franklin Dam dispute] was a bitter struggle is to put it mildly. It has raged for over 3 years and in the process had ended the careers of two State Premiers, a State Government and many Parliamentarians both State and Federal. It aroused large public demonstrations, not seen in Australia since the anti-conscription days of the war in Vietnam. It ended lifelong friendships, divided families and turned politics on its head in the serene and beautiful island of Tasmania in a manner unprecedented in its near 200 years of recorded history.*³⁸

Both the Federal Labor party leader, the Hon. Bob Hawke, and the Tasmanian Liberal party leader, the Hon. Robin Gray, made spectacular political mileage during the 1983 federal and 1982 state elections as a result of this dispute. The Tasmanian Government intended to dam the Franklin River for the production of hydro-electric energy at low cost to provide the means necessary to achieve economic growth and additional employment. The hydro-electric power scheme would have used, for a second time, the water which had generated power in passing through the Gordon power station from Lake Gordon. The opposition to this power development gathered momentum over many years; the green lobby had learnt many lessons from its failure in the early 1970's. The dispute between protecting the wilderness and significant aboriginal archaeological sites, as against the development proceeding, gained international significance.

The area in which the dam was proposed for development was, according to the Australian Federal Government, of sufficient quality and natural significance to

³⁸ Hon. Barry Cohen, Minister for Home Affairs and Environment, Speech to World Wilderness Congress, Inverness, Scotland, 10 October 1983.

satisfy the criteria for listing on the World Heritage List pursuant to the World Heritage Convention.

In a letter from the then Tasmanian Labor Premier, the Hon. Doug Lowe, to the then Prime Minister, the Hon. Malcolm Fraser, on 22 September 1981, a request was made that 769,355 ha of Western and South-Western Tasmanian, 11.3% of Tasmania as a whole, be nominated for listing on the World Heritage List, these areas being State National Parks at the time. The Federal Government, at the direction and agreement of the Prime Minister, agreed to the nomination on 13 November 1981 and forwarded this to the World Heritage Committee in Paris. A final management plan had not been prepared and was not in place for the nominated areas, but despite this, and according to the nomination document it satisfied all the criteria required for listing for World Heritage.

By July 1982 construction and investigatory work had commenced on the dam. In September 1982, 14,125 ha was vested in the Hydro-Electric Commission, and building of the dam commenced. The planned water storage reservoir was to have a surface area of 12,000 ha of which 9,500 would be within the National Park – 769,355 ha, being 1.23% of the total South-West area.

In December 1982, after being notified of these and other construction works, the World Heritage Committee recommended to the Australian Federal Government to 'take all possible measures to protect the integrity of the property'. The World Heritage Committee made the suggestion that the Australian Federal Government should seek the placement of the area on the World Heritage Endangered List – due to the construction works.

Consequently, the Tasmanian Liberal Government argued that the dam would take up only approximately 1.3% of the World Heritage Area and, in any event, the natural features which justified the listing of the area were found in the area as a whole and, accordingly, the flooding of this small area would not diminish the value of the whole. The green lobby and Tasmanian Aboriginal activists vehemently disagreed. A number of Aboriginal caves and archaeological sites were under threat. The Federal Labor Government, at a later date, said that the cave sites contained irreplaceable evidence concerning the occupation of the river system by

Ice Age man and other Aboriginal descendants. The Tasmanian Liberal Government asserted that there were no significant sites as described in the subject area, and if they were so considered there were numerous similar sites or sites of greater significance elsewhere in Tasmania. One of Australia's leading political commentators had this to say:

*Initially, all the major political parties were opposed to intervention in Tasmanian affairs, but it was a combination of public pressure, political leverage by the Democrats and outspoken comment by some Labor and Liberal backbenchers that eventually persuaded the Labor Party that votes might be garnered in marginal seats at a Federal election, if the environmental coalition and especially The Wilderness Society were campaigning.*³⁹

The Federal Labor Government, led by the then Prime Minister, the Rt. Hon. Bob Hawke, moved swiftly after the election, on 13 March 1983, to enact the World Heritage Properties Conservation Act 1983 and pass the World Heritage (Western Tasmanian Wilderness) Regulations 1983. According to the Federal Labor Government, this legislation enacted into Australian law responsibilities and obligations under the World Heritage Convention, although Australia was, at that time, the only country of the then 109 signatories to the Convention to enact such legislation.

On the one hand, the then State Liberal Government wished to proceed with the dam to provide power and continued growth and productivity and the Federal Labor Government wished to stop the construction of the dam which it considered would damage the integrity of the World Heritage area.

The Australian Financial Review in its editorial on 8 March 1983, three days following the election of the Hawke Labor Government, stated:—

³⁹ Bruce Davis, Associate Professor, Political Sciences, Murdoch University, 'Federal-State Tensions in Australian Environmental Management : The World Heritage Issue', Environmental and Planning Law Journal, June 1989, pages 69 and 70.

A major constitutional crisis was really not a good way to kick off a Government committed to consultation and unity ... But there must be a limit to the extent to which the Commonwealth can enter into international agreements in order to override the States. If Mr Hawke is really committed to reconciliation, he will have to forget about using a legal bludgeon to bring Tasmania into line ... What we may end up looking at is not the price of the dam and its alternatives, but the price of living in a true Federation and maintaining State's rights within it.

However, the primary constitutional question was whether the Federal Government legislation – the World Heritage Properties Conservation Act 1983 and the regulations made pursuant to it and the National Parks and Wildlife Act 1973, were valid. If so, it would be unlawful to construct the dam without the consent of the Federal Government Minister. The High Court decided 4 to 3 in favour of the Federal Government. Consent was not granted by the Federal Minister and progress on the dam was stopped.⁴⁰

The Franklin Dam dispute became a watershed in the environment/development debate in Australia, in both legal and political terms. The High Court decision opened new avenues for the federal government to exercise its powers over land uses that were traditionally a role of the states. The dispute polarised the Australian community and, more particularly, the Tasmanian people. The 1983 Federal election results in Tasmania were evidence that a clear majority of Tasmanians supported the right of Tasmania to decide the issue free from Federal Government interference.⁴¹ The dispute was perceived as 'save the environment' or 'provide more energy for industry and jobs' – there could be no in-between.

The green lobby successfully tapped the emotions of many urban dwellers in Australia's mainland cities. The use of films, pictures and powerful images to sell its case were clever, persuasive and effective.

David Bellamy, British botanist, during the protests to block the development was arrested on his birthday and the media gave the birthday in gaol much attention; a

⁴⁰ See also Bates, G M, *The Tasmanian Dam Case and its Significance in Environmental Law* (1984), 1 *Environmental and Planning Law Journal*, 325.

⁴¹ All five House of Representative seats were won by the Liberal Party.

well orchestrated event, entirely successful in its aims and objectives. At one time during the dispute, over 1000 protesters were gaoled during a two month period.

On the other hand, the supporters of development stressed the need for energy for industry and the resulting jobs. They did this through the use of facts and figures. Industry in Tasmania was negligent in its omission to adequately counteract the arguments and efforts of the green lobby in its use of images and pictures. However, some attempt was made to present a cogent argument and the following information prepared by the Combined Tasmanian Chambers of Commerce in 1983, which was distributed widely around Tasmania, is an example of that attempt.

COMPARATIVE CAPITAL COSTS (at 1982 prices)

1. Gordon below Franklin Hydro-Electric Scheme (180 m.w. average output)	\$453 m
2. Equivalent Coal Fired Thermal Power Station (300 m.w. installed capacity or 180 m.w. average output)	\$300 m
3. Submarine Cable from Victoria	\$320 m

COMPARATIVE UNIT COSTS OF POWER (at 1982 prices)

Gordon below Franklin Hydro	1.64 cents
Coal Fired Thermal	4.07 cents
Cable from Victoria	4.10 cents

And for some of the other alternatives investigated :-

Nuclear	4.80 cents
Oil Fired Thermal	5.60 cents
Wind	8.60 cents
Solar	18.00 cents

THE GORDON BELOW FRANKLIN PROJECT

Installed capacity (4 machines)	296 m.w.
Average output	180 m.w.
Access road length	71 km
Dam construction – rock filled, concrete faced	
Dam height	105 metres
Lake surface above mean sea level	76 metres
Area of lake	12,000 ha
Maximum length of lake	36 km
Programmed completion date	1991
Number of people directly employed on project at peak of construction, 1985	1,200
Total number employed both directly and indirectly in Tasmania during construction	2,500

ENVIRONMENTAL ASPECTS

The Franklin River

Total length of river	123 km
Length flooded	35 km
Length not affected	88 km

SOUTH WEST NATIONAL PARKS AND CONSERVATION AREAS

South West Conservation Area	1,435,000 ha
Area affected by flooding	12,000 ha
South West National Park	not affected
Frenchman's Cap National Park	not affected
Gordon River State Reserve	not affected
Lyell Highway State Reserve	not affected
Truchanas Huon Pine Reserve	not affected
Sarah Island Historic Site	not affected
Wild Rivers National Park	affected 8,800 ha
	not affected 186,400

Despite the above, and other attempts to present a factual argument, the issue had become far too emotionally and politically inspired. The state Liberal government strongly supported the hydro development proceeding, the Federal Labor party strongly supported the abandonment of the development. The snowball effect of motivating and influencing community opinion was unmatched in the history of Australian environmental politics. The debate was verbal as well as physical and achieved international prominence. Emotionally inspired statements such as the following were common:

*The south west is now being rapidly dismembered by piecemeal developments and if this were permitted to continue unchecked, there would soon be nothing left but isolated remnants amid an industrialised landscape.*⁴²

Statements like these typify the green lobby's strategy – a strategy that thrived on confrontation and controversy. It was inclined towards the sensational. The green lobby often denigrated and dismissed the pro-dam views and opinions as the product of economic greed or simply 'tunnel vision'. These accusations of bias were, perhaps in some sense, true, but with regard to the latter accusation, it was and is equally true with respect to elements of the green lobby which are more single purposed and tunnel visioned than most currently existing lobby groups. The strategy of the green lobby effectively embedded in the minds of the general public the idea that there was an 'ocean' of difference between their viewpoint and that of

⁴² Les Southwell, *Mountains of Paradise*, Sydney, 1983, page 45.

the opposition – there was no middle ground. Its efforts were so successful that it caused the then Liberal Party Prime Minister, the Rt. Hon. Malcolm Fraser, who was concerned about the forthcoming federal election and the growing electoral support for the Labor Party opposition, which was committed to stopping the hydro development proceeding, to say

Under the Australian Constitution, the Commonwealth does not have a specific power to order that the damming of these rivers should not proceed.

Suggestions have been made that the Commonwealth should coerce the Tasmanian government by holding back payments to Tasmania that would be made in the normal course of federal–state financial relations. Those suggestions are unconscionable and immoral. My Government rejects them absolutely. ⁴³

The Prime Minister went on to make an offer to the Tasmanian Government :

The Commonwealth is prepared to provide a grant of the full capital cash of a modern environmentally clean, coal fired power station in Tasmania to generate on demand electricity equivalent to that which would be generated as a result of damming the Gordon–below–Franklin.

Protection of the environment does not come free. It demands some sacrifice. ⁴⁴

This offer of compensation amounted to approximately AUS\$500 million at 1983 prices.

As noted earlier, the Labor Party won the federal election, introduced the World Heritage Properties Conservation Act 1983 and accompanying regulations and stopped the development proceeding. The dispute was a landmark in legal and political terms and an unparalleled success for the green lobby.

THE 1984 DEMAND FOR AN ENLARGED WESTERN TASMANIA NATIONAL PARK

In March 1984 the Tasmanian Wilderness Society proposed that the Western Tasmania National Park be enlarged to 1.76 million hectares. ⁴⁵ The implications

⁴³ Prime Minister Malcolm Fraser, Media statement, 19 January 1983.

⁴⁴ *ibid.*

⁴⁵ The Wilderness Society, "Proposal for a Western Tasmanian National Park", March 1984.

of this suggestion were quite severe and highlight the impact of the claims, if successful, on the productive industries. An assessment of the economic implications of the concept of an enlarged Western Tasmania National Park was prepared by Peter Bennett and Associates Pty Ltd in June 1986 on behalf of the productive industries.⁴⁶ The detrimental impact on the forest industry was referred to in the report.⁴⁷

The report summarised the impact of TWS claims being successful, with respect to the mining, hydro and forestry industries:-

*In summary, it is estimated that over a 20 year period, approximately 11,727 direct and indirect jobs will either be lost or not replaced in these three sectors if the extended Park became a reality. No tourist based alternative – widely mooted by the conservation movement – could offset such losses. Such alternatives could never offset the anticipated loss of foreign export earnings.*⁴⁸

In essence, the submission states that The Wilderness Society proposal to establish a Western Tasmania National Park has serious economic implications for Tasmania.

The submission notes that The Wilderness Society claim is for all hydro-electric, mining and forestry developments to be terminated, and that no further roads will be built in the area. The impact is wide-ranging according to the Bennett report. The

⁴⁶ Peter Bennett and Associates, An assessment of the economic implications of the concept of an enlarged Western Tasmania National Park, for Tasmanian Confederation of Industries, Forest Industries Association of Tasmania, Tasmanian Farmers and Graziers Association, Master Builders Association, Hobart Chamber of Commerce, Tasmanian Logging Association and Tasmanian Chamber of Mines, Hobart, 1986. See also Large, R, "The Mineral Wealth of Western Tasmania and the Potential of the South West Conservation Area", Tasmanian Chamber of Mines, 1987.

⁴⁷ *ibid.*, page 31.

'In the forest-based industries, it is relevant to note that Australia is a net importer of forest products. Despite this, there is evidence that huge areas of forest land have been withdrawn from development because of conservation pressure. Within the Tasmanian context, it is estimated that the Western Tasmania National Park will contain 24% of the State's timber resource and 21% of the State's pulpwood resource over the next 20 years.

'Given the increasing importance of this timber resource in future years, it has been calculated that a total of approximately 4,282 direct and indirect jobs may be lost in a variety of forest based industries. This corroborates the 4,651 which a Forestry Commission survey estimated as being lost under similar circumstances.

'Broad estimates indicate that foreign export earnings from forestry products may decline by \$32.236 million, or 21.3%, if the timber resources of the proposed Western Tasmania National Park become unavailable. This decline also represents 3.8% of the State's total foreign export earnings. Expert and independent advice concludes that there is no alternative to this timber resource.'

⁴⁸ *ibid.* page (ii)

fact that TWS gave no consideration to the consequences of this claim highlights the inadequacies of the national park listing and world heritage nomination procedures. It is submitted that heritage decisions cannot be viewed in isolation. The economic, social, cultural and community considerations should be taken into account.

Although the proposal related to the establishment of the National Park, the implications of such a proposal are vast. The importance of appropriate procedures being in place for the purposes of dedicating areas of Tasmania's national parks or state reserves is highlighted in the Report. The same concerns relate to the listing of world heritage areas.⁴⁹

In a further report prepared by Peter Bennett & Associates for the Tasmanian Chamber of Commerce reference was made to the impact on jobs, both direct and indirect, of world heritage listings in Tasmania.⁵⁰ The report suggests that 889 direct and indirect jobs were lost due to reduced sawlog availability, and 1498 jobs due to no increase in the woodchip export quota, being a total of 2387 direct and indirect jobs lost not including the mining sector.

*The above implications carry with them an estimated direct and indirect loss of \$244.5 million in output and capital works and \$56.6 million in wage and salary industries.*⁵¹

The report was prepared following the Lemonthyme and Southern Forests Inquiry and the proposal by the Federal government to enlarge the world heritage area by 254,100 ha.

An analysis of the cost of making certain areas of land unavailable for forestry and mining is presented in a report prepared for the Combined Councils in June 1991.

⁵² The analysis demonstrated that in dollar terms the impact of prohibiting access

⁴⁹ Australian Conservation Foundation, The Wilderness Society and Tasmanian Conservation Trust, Western Tasmania Stage 2 World Heritage: A Draft Nomination, 1987.

⁵⁰ Peter Bennett and Associates, Economic Implications of recent lost development projects in Tasmania for the Tasmanian Chamber of Commerce, Hobart 1990.

⁵¹ *ibid.*, page 3.

⁵² Guy Barnett and Associates, The Costs and the Balance, A response to the Forests and Forest Industry Strategy submitted by the Combined Councils June 1991, Hobart.

to certain land could be substantial. The report recommends these costs should be taken into account in any decision making with respect to heritage areas.

The analysis was completed on behalf of four local governments in northern Tasmania and related to them alone. Of the total area assessed, it showed over 55,000 ha was formally and officially unavailable for forest operations. The value ascribed to the timber in this area was over \$550 million. The report stated that this area was unlikely to ever be made available for forest operations because it included mostly State Reserves, eg. National Parks.

It also showed that over 30,000 ha was dedicated as either a deferred forest area (an area made unavailable under the FFIS) under the FFIS strategy, or was registered, interim listed or nominated on the National Estate. Accordingly, a significant portion of this area was unavailable for forestry operations as its future status was unclear. The value ascribed to the timber in this area was over \$385 million.⁵³ See the chart set out in the appendix.

Again, the conclusion to be made in response to such an assessment is that these matters and this type of evidence should be taken into account when considering the land use plans for the area. Under existing legislation⁵⁴ the only consideration required is the conservation value of the area.

THE TASMANIAN PARLIAMENTARY ACCORD

INTRODUCTION

The Green Independents achieved more of their stated agenda with the signing of the Tasmanian Parliamentary Accord, referred to as the 'Green/Labor Accord' or 'Accord', than in any other single event. This document adversely affected forestry and mining operations and vastly increased the areas in Tasmania dedicated to national parks and world heritage. The following reviews the formation and signing of the Accord and then evaluates the document by assessing its impact, particularly

⁵³ The values are calculated on a basis of \$150 per cubic metre for sawlogs and \$75 per cubic metre for pulpwood. This information is derived from figures used by North Forest Products Ltd (formerly APPM) when undertaking similar assessments. See the chart set out in the Appendix.

⁵⁴ National Parks and Wildlife Act 1970, World Heritage Properties Conservation Act 1983.

with respect to world heritage. The remaining parts of this chapter relate to the impact in economic, social and environmental terms of the claims made by the Green Independents and The Wilderness Society.

THE 1989 STATE ELECTION

The election on 13 May 1989 saw the number of Liberals in the House of Assembly reduced from 18 to 17, with 46% of the total vote, thus losing their absolute majority. Labor lost two seats, reduced to 13 seats, with only 34% of the vote, the lowest vote for the Labor party at that time since 1908,⁵⁵ while the Green Independents increased their representation from 2 to 5 seats, with 17% of the vote and the balance of power.

The Labor Party leader, the Hon. Michael Field, and other key Labor party personnel negotiated the Tasmanian Parliamentary Accord with Dr Brown and the Green Independents. This Accord subsequently came to be known as the Green/Labor Accord and is set out in the appendix. The Accord document contained a number of significant 'green' initiatives including those relating to the nomination of further World Heritage areas. It represented the price paid by the Labor Party for government.

A major stumbling block to the final signing of the Accord, was the banning of 'logging in National Estate areas' – over 30% of Tasmania at the time. The final agreement was in many ways a victory for the Greens, with a ban on forest operations in certain areas and a moratorium on nearly all National Estate areas listed at that time. The moratorium was to allow a review of these areas, to determine their heritage and conservation values and to assess their productive potential. However, on the same day the Accord was agreed to by the Labor Party and the Green Independents, the Governor commissioned the Liberal Party Leader, the Hon. Robin Gray, as Premier, and leader of a minority government. The strength and effectiveness of the Accord would have to be tested in Parliament.

About one month later on 28 June 1989 Parliament resumed and a no confidence motion in the Hon. Robin Gray and his Government, moved by Green Independent

⁵⁵ Until 1 February 1992 when the Labor Party vote slipped further to 28% giving it only 11 seats.

Dr Brown, and supported by all the Green Independents and the Labor Party was passed. The successful passing of this motion saw him return to the Governor and resign his commission as Premier. On 29 June 1989 the Governor, Sir Philip Bennett, considered the Green/Labor Accord, conducted separate meetings with Mr Field and each of the 5 Green Independents and, after being satisfied stable government would ensue, commissioned Mr Field as Premier.

A chronological review of the months preceding and following the signing of the Green/Labor Accord is set out in the Appendix.

THE CONSTITUTIONALLY RELEVANT EVENTS OF 1989

A summary of the Constitutional events involving His Excellency The Governor of Tasmania concerning the dissolution of the House of Assembly on 18 April 1989 and the subsequent general election on 13 May 1989 together with the other relevant documents tabled in State Parliament are also set out in the appendix.

It will be noted that the election results were declared on 29 May 1989. The Governor received a letter from the Leader of the Opposition advising him to commission a Labor Minority Government based on an alliance with five Independent members of Parliament. The Governor referred the letter to the Premier who responded that as no formal coalition was in place the Governor should allow his commission as Premier to continue. This advice was given to the Governor at 5 p.m. on 29 May and the Governor accepted it shortly thereafter. However at 7 p.m. on the same day a copy of the Tasmanian Parliamentary Accord was delivered to the Governor. If the Leader of the Opposition had delivered the Accord document two hours earlier, it was possible the Governor, following the reception of advice, would have commissioned him Premier of a minority Labor Government.

This assessment is based on the fact that in approximately one month the Governor accepted fundamentally the same document as evidence that the Labor minority government should and could be commissioned. The Accord document was, however, referred by the Governor to the Premier for advice. The Premier's advice in response was that the document did not influence the capacity of the minority

Liberal government to continue in office. The Governor accepted this advice. The course of events raises several questions of a constitutional nature. These questions are important inter alia, because the prospect of the balance of power in the future being held by a minority third party is genuine and real.

To what degree was the Governor obliged to follow or accept the advice of the Premier? The Premier advised the Governor on 23 June 1989 that the Solicitor-General was the principal legal adviser to the Governor. However, on 27 June 1989 at 5.30 p.m. the Premier stated to the Governor that following constitutional legal advice he had received the Premier could seek the Governor's approval to dissolve the House of Assembly and such a decision would be within the proper limits of constitutional convention. The Governor indicated that, subject to developments when the House met, he was unlikely to accept such advice, if given. The Governor appeared to be concerned with the advice proffered by the Premier to him in advance of the resumption of Parliament on 28 June 1989.

Tasmania was at this time facing a constitutional crisis. The Governor had, perhaps on legal advice, stated his own opinion that he would not accept the advice of the Premier of the day despite being informed that if the Premier sought approval from the Governor to dissolve the House of Assembly, it was within the proper limits of constitutional convention. The question for consideration then becomes to what degree can a Governor disagree with the advice of the Premier and, further, to what extent should a Governor obtain his or her own legal advice in an effort to make the correct judgment. The summary of constitutional events provides evidence that the Governor 'secured the Premier's agreement for His Excellency to explore the capacity of the Leader of the Opposition to form a Minority Government'.⁵⁶

Only the then Premier and the Governor know if the Premier requested the Governor's approval to dissolve the House of Assembly on 29 June 1989. If the Premier did, this request was denied. What efforts the Governor made to 'secure' the Premier's agreement is not known. However, the Governor has made it clear that there would be instances when he as Governor would not accept the advice of the Premier despite the advice or request being apparently within the limits of

⁵⁶ 29 June 1989, 1.30 pm – please see the appendix.

constitutional convention. This highlights the need for a careful consideration of the power and role of the Queen's Representative at both a state and commonwealth government level. It is submitted that if the advice of the Premier is legally sound and within conventional limits, the Governor is obliged to accept it.

A second constitutional question arose when the Governor, following discussions with the then Leader of the Opposition, sought written assurances from the leader and the five Independents that stable government would be provided for a reasonable period. The Governor referred specifically to five aspects of the Accord 'agreement' that had the potential to provide instability. The Governor, in fact, summoned the five Independent members to address these matters individually and separately. The Governor said in his letter to the Leader of the Opposition dated, 29 June 1989, that he (the Governor) needed to satisfy himself that 'there exists, in fact, an agreed and adequate basis for Government for a reasonable period of time.' Following the Leader's response and that of the Independent members, the Governor stated his intention to commission the Leader of the Opposition as Premier.

The Governor however also stated 'I do this on the understanding that you, your party and the Independents will comply with the assurances to which I have referred'. It is unclear what the Governor could do if and when these assurances were broken. To what degree the Governor can exercise his or her legal authority is something judged by convention. In this instance, the limits to the Governor's authority were very unclear. A full version of the relevant letters is set out in the appendix.

Finally, with what status did the Governor see the Tasmanian Parliamentary Accord? Was it a legally binding agreement? By accepting the assurances of the Leader of the Opposition and the Green Independents, the Governor expressed a belief that it was binding on all parties. Soon after the Labor Party attained government however, members of the Green Independents publicly stated the Accord document was not a legally binding agreement. What could the Governor have done to ensure the assurances were met and, if they were not, what authority did he have to sanction the law-breakers?

THE ACCORD DOCUMENT

The Green/Labor Accord document and the subsequent 'coalition' arrangement between the Greens and Labor is the consummate political expression of the green philosophy. The document was a conglomeration of recommendations and aims relating primarily to the future of forestry operations and conservation measures. It was a unique document that brought into power the longest running green coalition government in the world. Tasmania, again, was seen as being at the cutting edge of Australian and international environmental awareness.

The Accord also included a 'social' reform agenda relating to freedom of information, container deposit legislation, Aboriginal land rights, price control and homosexual law reform. It was a document which provided a governmental platform for the Labor Party while granting the Green Independents a mechanism to reach their stated objectives.

Inevitably, however, the Accord meant there was compromise on both sides. The Labor Party was severely criticised by some traditional supporters. Similarly, the Greens were seen by some of their supporters to have signed away their independence and 'principles'. Their rejoinder was to say that by staying out of Cabinet they had retained their independence (and principles), while having special access to Cabinet papers and decisions, and enormous power to influence government policy and action.

Within just a matter of months the Greens, with 5 seats out of 35 and 17% of the total vote, had achieved a majority of their stated aims, as set down in the Accord. Some of the aims related specifically to the nomination, listing and management of world heritage. The terms of the Accord brought vast changes within State government departments. The Accord focused their attention on green policies and directed how the departments should (or should not) respond.

Despite the fact that the Green Independents stated that it was not a legal document, binding on the signatories, the Accord was a document which delivered government to the Labor Party, despite holding only 13 of the 35 seats in the House of

Assembly. It is on the basis of this document that the Labor Party was provided with a mandate to govern.

Prior to the state election there were emphatic denials that there would be any coalition. For example, the Hon. Michael Field, Leader for the Labor Party, on radio before the election, stated as follows:-

There will be no deal. We can't go to an election on one platform and then do a deal behind closed doors after that election. That would be a betrayal of the people who voted for us. ⁵⁷

Public consternation arose because the Accord document committed the Labor minority government to a range of policies and actions which were not mentioned or referred to within its own policy platform presented prior to the 1989 election. The Accord contained a hastily devised list of objectives for the conservation movement. Despite this, however, it was in no way a comprehensive document. Because of this, it became clear that the Accord document would be subject to revision, deletion, and amendment after the 1989 election.

The Accord document is set out in the appendix and is set out in three main sections as follows: 1. Stable Government; 2. Agenda for Reform; and 3. Review of Accord. It also includes a Heads of Agreement, which was divided into 17 clauses and an appendix outlining the Agenda for Reform. It is submitted that history will show that the single, crucial catalyst to the enormous gains made in conservation and preservation measures in Tasmania was the signing of the Labor/Green Accord.

A substantial part, 12 of the 17 clauses of the Heads of Agreement, referred to forestry and conservation measures. The first five clauses refer to the role of the Green Independent members in government, parliamentary reform, departmental appointments, legislative research service and parliamentary staffing.

The method of contribution from Green Independent members to the processes of government is set out in clause 1. Clause 1(a) provided that Green Independent members could nominate spokespersons in policy areas. The Green Independents denied the fact that they constituted a party prior to the 1989 election. They said

⁵⁷ ABC 'PM' programme, 18 April 1989.

they represented 'one' voice, i.e., they were all independent. Accordingly, on whose behalf would they speak?

The Green Independents referred to themselves during the 1989 election campaign as 'The Independents', and the perception during the campaign was that they were acting as a political party. However, they did not register as a political party, pursuant to the Electoral Act 1985 (Tas). Part IV (specifically sections 55, 56 and 57), describes what actions are necessary to register as a political party. The application must be in writing, signed by 100 persons, each of whom has attained 18 years of age, is ordinarily a resident of Tasmania, and is a member of the Party for which an application is being sought.

Nevertheless, the Independents, as they were referred to on the ballot papers and the Green Independents as they were subsequently referred to, enabled Labor to claim Government on the basis of common views with the conservation lobby on a range of matters. The Accord document was publicly presented as a credible basis for a parliamentary alliance.

Clause 1(d) provided that Cabinet and Green Independent members were to meet on a regular basis to discuss general policy matters. It is unclear whether this would mean in practice that all Labor Cabinet agenda items would be open to or negotiable with the Green Independents. Who should determine what were general policy matters? Would the usual Westminster tradition of Cabinet solidarity have applied? Presumably not.

Clause 1(e) provided for the Green Independents to have the option of attending Ministerial conferences as observers. The taxpayer covered the added cost for these conferences attended by the Green Independents (it should be noted that opposition representatives were not entitled to attend or if so, only at their own expense).

Clause 1(f) provided that the Green Independents were to be entitled to make policy submissions to Ministers prior to any decision by Cabinet. This clause required nearly all Cabinet proposals be made available to the Green Independents prior to Cabinet consideration. The confidentiality of Cabinet discussions was called into

question. As the relationship progressed, and soured, the open Government approach espoused shortly after the signing of the Accord became more restrictive.

In regard to parliamentary reform, Clause 2(a)(iii) provided that the Green Independents, as a group, have the same rights as the Opposition in the House. Here the document provided evidence that the Green Independents were viewed as a group and not as individuals representing independent views. It is submitted that the Green Independents were acting as a political party from the first day of the Accord.

Clause 3(a) provided that the Green Independents were to be consulted on appointments to selection panels for heads of Departments. One could surmise from the document whether the Green Independents were to be consulted only on the selection panels or on the selection of the actual heads of Department. This method of consultation was unclear from the wording of the document.

Clause 5 referred to Parliamentary staffing and had three sub-clauses which effectively put the Green Independents on the same footing as the Opposition Liberal Party with respect to their funding and resources. This was further evidence in support of the view that the Green Independents should be viewed by the public as a group, and not as individuals who are independent of each other.

Clauses 6 – 17 referred to forestry and conservation matters.

These clauses were certainly not policy statements but more akin to a 'wish list' of proposed government decisions. Examples of this wish list follow :-

Clause 6 provided that a Douglas Apsley National Park would be gazetted in 1989 with the boundaries defined by the Departments of Lands, Parks and Wildlife, in agreement with the Green Independents.

Such a provision provided enormous scope for the Green Independents (and thereby the conservation lobby) to achieve their objectives in dedicating further areas of Tasmania as single use areas (e.g., National Park). This provision of the Accord is not a good example of rational long term planning. It is deficient in that it bypassed the usual assessment procedures for such areas. Without consultation,

discussion or assessment, Clause 6 was negotiated behind closed doors and locked up from production forests an estimated 46,000 m³ of eucalypt sawlog and 420,000 m³ of eucalypt pulpwood.

On the basis of \$150 per m³ for eucalypt sawlog and \$75 per tonne for eucalypt pulpwood,⁵⁸ this would amount to a loss of \$6,900,000 and \$31,500,000 respectively to the Tasmanian community. Further, it should be noted that this action prohibited access to approximately 50% of Tasmania's black coal reserves.

The National Park covered the whole area of retention licenses Nos. 8710 and 8711 held by Shell Australia Ltd and Industrial and Mining Investigations Pty Ltd (IMI).

It had, with State Government encouragement, expended some \$4.2 million to November 1989 on exploration activities. There was an estimated 200 million tonnes of coal in the ground. An economic or social impact statement was never prepared and made available for public comment and input. No mention was made, and efforts were not recognised, of the Forestry Commission who had done a considerable amount of preparation and planning to provide appropriate management practices to fully protect the area's environmental values.

The decision was made behind closed doors and did not allow for any public participation or contribution. Certainly, the best and most detailed information was not available at the relevant time to make the decision.

Clause 7 provided that the Huon Forest Products venture at Port Huon would not be allowed to proceed. This was in contradiction of the Labor Party's policies during the election campaign and cost the Tasmanian taxpayers \$4 million dollars in compensation for the company paid for by the State Government.⁵⁹

Clause 8 ruled out Wesley Vale as a site for a future pulp mill. Both the former proponent (The North Broken Hill and Noranda Forest joint venture) and the State Government had done extensive research and analysis and found that Wesley Vale was the most appropriate site prior to the development being halted in March 1989. The Accord document ruled out Wesley Vale as a site for a future pulp mill and,

⁵⁸ The commercial cost per m³ according to APPM at the time.

⁵⁹ Widespread media reports in Tasmanian daily newspapers in late 1989.

accordingly, put at risk the future of a world class pulp mill in Tasmania. Evidence to support the conclusion that the Wesley Vale site be excluded from consideration was lacking.

Clause 9 provided that the State export woodchip quota would not exceed 2.889 million tonnes per annum. The Green Independents used this clause as the reason for the dissolution of the Accord. They argued that because the Labor Government endorsed the Forests and Forest Industry Strategy, which provided for an increase in the quota above the 2.889 million tonnes per annum, the Accord was at an end.

With regard to world heritage concerns, clause 10 provided that:

The Denison Spires area, Hartz Mountain National Park and Little Fisher Valley will be immediately added to the current World Heritage nomination. The Denison Spires area and Little Fisher Valley will be gazetted as National Parks in 1989.

The second World Heritage nomination relating to property in Tasmania was made by the Federal Labor Government following the Helsham Inquiry in 1988. Clause 10 of the Accord provided that those areas specified should be recommended to the Federal Government immediately for adding to its earlier world heritage nomination. The Commonwealth Government, without further debate, consultation or public hearings, acceded to the request and those areas were added and subsequently agreed to by the World Heritage Committee at its meeting in December 1989.

Clause 11 of the Accord provided that:

The following areas will be nominated immediately for World Heritage listing:

*Hartz Mountains National Park
Little Fisher Valley.*

The following areas will be considered for listing as a matter of priority:

- Central Plateau Protected Area and adjacent forest reserves*
- the Campbell River area*
- the Eldon Range*
- Lower Gordon River (catchment).*

This clause was included despite the Commonwealth Government being the only government which could nominate an area for World Heritage listing. The document provided for the nomination to be made by the State Government and this is not legally possible. In addition, the areas referred to in the document were ambiguously defined, thus leaving the precise area to be recommended by the departmental representatives and certain members of Parliament. A full and rigorous assessment procedure was not undertaken.

Clause 12 provided that:

The World Heritage Planning Team within the Department of Lands, Parks and Wildlife will prepare a report on the appropriate boundaries of a Western Tasmania World Heritage area (with the existing National Estate Area as a reference point) (the 'Appropriate Boundaries Report') for presentation to the World Heritage Committee by 1989.

The remaining clauses in the Accord provided for the State Government to recommend massive increases in National Estate Areas of the State, thus removing large areas of the State from productive activity. Clause 15 provided that:

Any National Estate Areas which the review identifies as not essential to the logging industry will be protected as national parks.

Thus, the Accord document had a far-reaching effect on the productive industries in Tasmania.⁶⁰

THE FORESTS AND FOREST INDUSTRY STRATEGY

The Tasmanian Parliamentary Accord also established what was known as the Salamanca Agreement. This Agreement was the cornerstone of the Accord. The Agreement led to the irreconcilable conflict between the Green Independents and the Labor Party and, ultimately, to the suspension of the Accord document.

⁶⁰ Further, the Agenda for Reform, set out in the Accord document as Appendix 1, illustrates the second 'wish list' of objectives and decisions required by the Green Independents, and viewed as essential to an agreement to support the minority Labor Government.

It is interesting to note, however, that the final item on the agenda for reform was the decriminalisation of homosexual acts between consenting adults in private (with a free vote for ALP members). Reference has already been made to the close link between the gay movement and the conservation movement in earlier discussion. Both movements use similar lobbying tactics and have the same or a similar support base. The green lobby has made a special attempt to gain the support of groups such as the gay lobby.

The Salamanca Agreement, signed 31 August 1989, was an agreement between the Government, farmers, forest industries, unions and the Combined Environment Group (represented by the Wilderness Society, the Australian Conservation Foundation and the Tasmanian Conservation Trust). The Salamanca Agreement recommended that a Strategy be completed within one year, to be known as the Forests and Forest Industry Strategy ('FFIS'). The development of the FFIS, in months of meetings between the parties, effectively took the forestry conflict off the front pages of the newspapers and out of the public eye. The Forests and Forest Industry Council ('FFIC') was established in February 1990 to develop the FFIS to be implemented from 1 September 1990. The composition of the FFIC reflected the composition of those who signed the Salamanca Agreement. The General Council of the FFIC also included representatives from the Commonwealth Government and the Municipal Association of Tasmania. It did not include representatives from the mining industry, despite the direct and indirect impact it would have on this industry. Mining industry representatives were not invited.

In an attempt to ensure public participation, Regional Advisory Groups were established in June 1990. Added to this, eight Technical Working Groups (TWG) were formed to provide the best available information on which to form the FFIS. Although some of the TWG final reports were made public, most of the submissions and information provided to the TWG were not made public.

On 1 June 1990 the FFIC released the 'Key Issues and Principles Likely to Shape a Forests and Forest Industry Strategy' document. It was this document to which the special interest groups and other members of the public responded.

Some 1,020 submissions were received by the FFIC in response to this document. Submissions in response to the Key Issues document were due on 10 August 1990 – leaving only three weeks for their assessment, analysis, comprehension, and the preparation of a final Strategy. The 1 September 1990 deadline was extended by the Government until 14 September 1990. All groups within the FFIC, with the exception of the Combined Environment Group (CEG), reached agreement on a report and recommendations for the FFIS. There is no doubt that the

recommendations set out in the FFIS represented significant compromise on all sides.

The process of developing the FFIS was unique in the fact that it demonstrated the possibilities of multipartite negotiations as opposed to the traditional bipartite negotiations. The latter have traditionally relied on their adversarial nature to attain agreement whereas the former attempts to rely on the consensus approach. The Strategy was the first of its kind in Australia. The success of the State Labor Government in bringing together diverse and opposing groups was widely applauded. Observers in other States, and the Federal Government, monitored its progress with great interest.⁶¹

⁶¹ Since 1972 there have been over one dozen major inquiries into Tasmanian forestry. The recommendations from the inquiries were made public. They were as follows:-

1. 1972 Tasmanian Legislative Council Select Committee Inquiry into Forest Regeneration.
2. 1975 Federal Working Group ... Economic and Environmental Aspects of Export Hardwood Woodchip Industry. Parliamentary Papers Nos. 116 and 117.
3. 1975 Senate Standing Committee on Science and Environment ... Woodchips and the Environment.
4. 1977 State Government Board of Inquiry, by Mr Justice M.G. Everett ... Private Forestry Development in Tasmania.
5. 1978 Senate Standing committee on Science and Environment ... Woodchips and the Environment.
6. 1981 Senate Standing Committee on Trade and Commerce ... Australian Forestry and Forest Products Industries.
7. 1985 Tasmanian Legislative Council Select Committee ... State Forestry Report.
8. 1985 Tasmanian Legislative Council Select Committee ... Woodchip Export Licenses.
9. 1985 Environmental Impact study on Tasmanian Woodchip Exports Beyond 1988, and Supplement to the Draft Environmental Impact Statement on the Tasmanian Woodchip Industry.
10. 1987 Pearse Report on Timber Rights in Tasmania; Problems and Opportunities.
11. 1988 Walduck Report on Small Sawmills of Tasmania.
12. 1988 Commission of Inquiry (Federal Government) into the Lemonthyme and Southern Forests (the Helsham Inquiry).
13. 1989 Ferguson Review of Private Forestry in Tasmania.
14. 1989 Commonwealth - CSIRO Environmental Guidelines for Pulp Mills Study.
15. 1990 Private Forestry Beyond 2000, Private Forestry Council of Tasmania.
16. 1989 Legislative Council Select Committee into Public Land Use.
17. 1990/1991 Forest and Timber Inquiry Draft Report and 1992 Final Report - Resource Assessment Commission.

However, prior to 1989 despite the recommendations of these inquiries being made public and formal agreements made, there was perhaps less security and confidence in the forest industry than ever before.

GREEN CONCERNS WITH THE STRATEGY

In late August 1990, the conservation lobby requested a 10 week extension to the 1 September 1990 deadline previously agreed by the parties to the Strategy. This was followed only days later by an announcement that the CEG never intended to compromise and a further statement they would not negotiate on the key issues.⁶² This was a major blow to the process and a source of short term embarrassment to the State Government, which had enjoyed praise and approval for the success to date of the process to that time.

The final Strategy document endorsed by the full FFIC, with the exception of the conservation lobby, was presented to the State Government on 20 September 1990.

The FFIS and accompanying implementation plan was accepted and endorsed on 1 October 1990. Unilaterally the State Government announced it would enact its own 'nature guarantee' legislation to take it out of the process and into its own jurisdiction. The FFIS related only to the protection of flora and fauna in private forests whereas the Government's nature guarantee legislation was designed to protect flora and fauna on all land. Its name was unfortunate in that it implied a guarantee of the life of nature over everything else, including human life. The rural community were justifiably concerned with this proposal.

The CEG presented, publicly, its own Strategy when pulling out of the FFIS. Accordingly, it had succeeded in gaining compromise from the parties to the Strategy throughout the one year of negotiations, and concurrently presented its own ambit claim. These actions of the CEG were, it is submitted, highly effective tactics and consistent with the conservation lobby's usual campaign techniques.

Further to this, the State Labor Government not only allowed but strongly encouraged the conservation lobby to participate fully in the implementation of the compromise Strategy. The forest industry and other parties to the FFIS endorsed the compromise FFIS.

⁶² For a further and different review of the collapse of the forest strategy process see Bonyhady, Tim, "Places Worth Keeping", Allen and Unwin (1993) at page 23.

The CEG's alternative strategy was a recipe for the decimation of the forest industry in Tasmania according to the forest industry which estimated 42% of Tasmania would become unavailable to forest operations. The forest industries (Forest Industries Association of Tasmania) comment and analysis is set out in the appendix. The proposal of the CEG did not include any economic or social impact statement.⁶³ Neither was such an impact statement proposed or called for by the minority Labor Government, the Liberal Party or the business community.

These efforts of the CEG were in addition to their previous claims with respect to National Parks and World Heritage. One of these claims related to additional National Parks and World Heritage. In a report dated 5 July 1990 the CEG claimed an additional 9,000 square kilometres or 14% of Tasmania be declared National Park and nominated for World Heritage. This was in addition to the existing 14,000 square kilometres or 22% of Tasmania already declared as National Park. If successful, this claim would have dedicated over 36% of Tasmania as National Park and World Heritage. The CEG listed 16 separate areas of Tasmania which met the specified criteria. The claim by the CEG is set out in the appendix. Other claims were made by the conservation lobby,⁶⁴ including one relating to a boycott on Tasmanian oak. The forest industry stated that the three species of oak to which the boycott would apply included two of the most common varieties of eucalypts grown in the State.⁶⁵

THE WORLD HERITAGE AREA APPROPRIATE BOUNDARIES REPORT

The World Heritage Area Appropriate Boundaries Report prepared by the then Department of Lands, Parks and Wildlife was dated June 1990, but it was not released until March 1991, some nine months later. The Report gained considerable media attention upon its release. It stated in its introduction that it was

⁶³ See comment and analysis set out in the Appendix.

⁶⁴ The Wilderness Society 1990.

⁶⁵ The three species of eucalypt represented the bulk of the logs used for sawmilling purposes. The three common varieties include: *Eucalyptus regnans* (swamp gum or stringy gum); *Eucalyptus delegatensis* (white top stringy bark); and *Eucalyptus obliqua* (brown top stringy bark).

prepared to satisfy the requirements of clause 12 of the Tasmanian Parliamentary Accord.⁶⁶

Further, the introduction provided:

The events leading up to the 1989 World Heritage nomination clearly do not constitute a desirable method of determining 'appropriate boundaries' to a World Heritage area.

Indeed, this admission by a state government department reveals a political edge to the policy development within the Department.

The Combined Councils incorporating Deloraine, Kentish, Latrobe and Longford, responded to the Forests and Forest Industry Strategy, June 1991, in the form of a submission entitled 'The Costs and the Balance'. The submission expressed alarm about the Department's Appropriate Boundaries Report:

*The Combined Councils consider the implications of the Report so significant it warrants an immediate and urgent review. A comprehensive assessment and analysis is necessary. The Combined Councils recommend the State Government undertake immediately an economic, social and community impact study of the Report and its findings.*⁶⁷

The Combined Councils' submission referred to the ability of the Federal Government to act unilaterally and nominate the area or even protect the area from further development until a proper and further assessment was made:

⁶⁶ Under the Westminster system of government, government departments take their advice from the Minister of that government department, not a document or agreement between two separate political parties.

⁶⁷ Guy Barnett and Associates, *The Costs and the Balance*, prepared for the Combined Councils, June 1991, page 64 available at Tasmanian Parliamentary library.

*A further 5% of Tasmania has effectively been nominated for WHA by a Tasmanian Government Department and the Federal Government, not only has the responsibility to respond, but an obligation to do so. Further, it is remembered that it is quite within the powers and functions of the Federal Government to act unilaterally and nominate the areas recommended in this Report for World Heritage. The Federal Government has a constitutional right and obligation to protect World Heritage areas on an interim basis pending final identification. Unless the report and its recommendations are rejected – the Federal Government not only has a right, but an obligation to consider whether such areas should be listed or protected in some way pending further assessment. Of course, the Federal Government can act unilaterally notwithstanding a full review and rejection of the Report by the State Government.*⁶⁸

The Department's Report recommended over 320,000 ha as additional areas for World Heritage nomination. This was 5% of Tasmania. It included over 3,000 ha of private land and over 100,000 ha of unallocated Crown land.

The Combined Councils agreed with the introduction section of the Department's Report, that the method of determining the appropriate boundaries for the 1989 and other WHA nominations in Tasmania had been sorely inadequate and undesirable.

*It is for this reason that we have made an effort to analyse the World Heritage area listing procedures and have provided recommendations for the future.*⁶⁹

The Combined Councils' submission referred to the areas considered in the Report⁷⁰ and noted that grazing had occurred in one of the areas recommended.

⁶⁸ Ibid., page 64.

⁶⁹ Ibid., page 65.

⁷⁰ 1. Blowhole Valley – Moulders Hill
 2. Southport Lagoon Wildlife Sanctuary
 3. Labillardiere State Reserve
 4. Lune River – Hastings Caves State Reserve
 5. Picton Valley (including area south of Hartz Mountains National Park)
 6. Middle Huon Valley
 7. Lower Weld Valley
 8. Slopes of Snowy Range
 9. Upper Styx Valley
 10. Mt. Field National Park
 11. Mt. Wedge Area
 12. Upper Florentine Valley
 13. Gordon Range – Blue Creek

The submission noted that part of the area suggested as appropriate for World Heritage was in State Forest. The Combined Councils called for an immediate economic and social impact statement to be prepared regarding the suggested changes to the World Heritage boundaries.

The lack of any economic, social and community impact study prior to, during or following the release of the Report together with the other observations made highlights the inadequate nomination and listing procedures and the need for reform.

THE WILDERNESS SOCIETY CLAIMS ON WORLD HERITAGE

The Wilderness Society made certain claims with respect to the management of World Heritage areas as set out in its Wilderness News, (newsletter) of February 1990. These claims emanated from a public participation program prepared by the Department of Parks, Wildlife and Heritage to assess community opinion on 'how to' manage the 20% of Tasmania classified as World Heritage.

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14. Counsel – Derwent area
 15. Navarre Plains
 16. Southern Central Plateau
 17. Mother Lords Plains – Gunns Lake area
 18. Great Western Tiers
 19. Mole Creek Karst area
 20. Mersey Valley
 21. Lees Plains
 22. Dove River
 23. Black Bluff – Vale of Belvoir
 24. Reynolds Falls – Mt. Cripps area
 25. Mt. Romulus – Granite Tor area
 26. Tyndall Range – Mt. Murchison area
 27. Mt. Dundas area
 28. Princess – Governor area
 29. West Coast Range – Braddon River area
 30. South of Macquarie Harbour
 31. Melaleuca – Cox Bight
 32. Savage River – Norfolk Range area
 33. Marine areas.' (pages 65 and 66)

The impact of the claims on not only industry but other Tasmanians is significant in that it imposes a comprehensive range of restrictions particularly relating to recreational uses. A summary of these claims is set out below :-

Boundaries – Enlarge the boundaries of the World Heritage area by defining the area in the Management Plan to include Western Tasmania and Western Tiers National Parks proposals. This claim in itself would enlarge the World Heritage area by administrative decree, by-passing the usual administrative and legal procedures requiring assessment and nomination by the Federal Governments and the World Heritage Committee. An analysis of this claim to expand the Western Tasmania National Park is set out above.

Horse riding – Not allowed anywhere.

4-wheel drive or trail bikes – Not allowed anywhere, 4-wheel drive tracks to be closed.

Sheep and cattle grazing – Not allowed anywhere, including areas adjacent to the western edge of World Heritage areas. The adjacent area is not defined.

Adventure tours – Limits on party numbers, frequency of tours, number of operators.

Shacks and huts – Remove all private, commercial and Hydro-Electric Commission huts. No new huts allowed.

Fish farms – Remove all introduced species, this includes the famous Tasmanian brown and rainbow trout.⁷¹

Roads – Most roads to be closed and 'rehabilitated'. No new roads.

Mining and mineral exploration – Not allowed, shut down existing mines and quarries.

⁷¹ Tasmania hosted the World Fly Fishing Championships in 1988 – the events for this Championship were located in Tasmania's World Heritage areas.

Forestry – Not allowed, a 'no forestry' buffer zone around the World Heritage Area. The buffer area was not defined.

Tasmania's Hydro-Electricity – To cease immediately the King and Henty Anthony schemes.⁷² No new schemes. Alternative power sources not stated.

Lake Pedder – Drain Lake Pedder. Remove dams on the Huon and Serpentine Rivers. Remove all roads, power lines and structures relating to Hydro-Electricity schemes. Alternative power sources not stated.

Maps – No new 1:25 000 maps. Phase out current 1:25 000 maps.⁷³

As discussed above, the impact of these types of claims are quite severe in economic and social terms. They highlight the need to review all the implications of listing an area for World Heritage and changing the management regime in such an area.

CONCLUSION

The impact of the conservation lobby on the development of government policy and legislation with respect to world heritage and other matters is substantial. The Labor/Green Accord set in place mechanisms and a Strategy that caused the dedication of further areas of Tasmania as World Heritage. A fundamental concern regarding these previous decisions to dedicate further areas as World heritage or other conservation type areas is not that the areas have been dedicated, but, rather, that the assessment process is clearly lacking. It does not give consideration to the economic, social, cultural and community effect of these decisions and gives precedence to environmental protection issues.⁷⁴

In addition, the listing and the management of these areas, requires the consideration of all matters of interest and not simply giving consideration to the conservation values associated with the area. Although these should be a primary

⁷² Tasmania's future energy options – developments nearly complete at time of Wilderness Society claims.

⁷³ No comment was given on the impact of this decision on the safety of walkers, people fishing, and the like.

⁷⁴ Cohen, B, "Greenies Foul Their Own Nests", Bulletin, 24 May 1988, page 52.

consideration, they should not be seen to operate as the sole consideration, thereby merely paying lip-service to the political, legal and administrative process.

The following extract from a discussion paper on electricity in Tasmania and the options for the future is revealing.

*Future expansion of the hydro system is limited since the World Heritage listing of significant areas of Central and Western Tasmania now means that many of the potential hydro power development options capable of meeting future lead requirements are not available. These include ... with a potential generation of 400 MW.*⁷⁵

The cost to Tasmania's economic, social and cultural well-being and its political stability should be acknowledged and assessed.

⁷⁵ The Energy Council, A Discussion Paper on Electricity in Tasmania – Options for the Future, Hobart, March 1994, page 92.

Chapter 8

MANAGEMENT OF WORLD HERITAGE – BENDER'S QUARRY

INTRODUCTION

The following chapter is a case study of the management of world heritage in Tasmania. The management of world heritage is a vital link to its full understanding. The actual management of world heritage areas has had enormous implications in a State like Tasmania with 20 per cent of its area in world heritage, and relying in an economic sense on productive industries such as forestry, mining and aquaculture. The question of how the management objectives are achieved, and decisions implemented, is answered. A special focus is given to the appropriate land uses in world heritage areas and details of this are set out in the Tasmanian World Heritage Area Management Plan referred to below.

This chapter specifically considers the history and background to the closure of Bender's limestone quarry in Tasmania's south-west world heritage area and the legal consequences of this. The chapter is set out in eight sections. The first details the history of management of world heritage in Tasmania; the operation of Bender's limestone quarry in south-west Tasmania; and the joint management arrangements. The second reviews the Commonwealth/State Heads of Agreement dated 28 November 1988. It reviews the details of the quarry operations and also the background leading to its closure. The third section considers the economic implications of the closure and the available alternatives. The compensation issues and the closure procedures are considered in sections four and five and the legal issues are reviewed separately in the final four sections.

These final four sections assess the adequacy of the world heritage area management regime and, in particular, the adequacy of the procedures, and outcome, relating to the closure of Bender's Quarry in south-west Tasmania. The Bender's Quarry closure is

vitally important to an appreciation of the management regime, but also raises other important legal issues including:

- 1 the status of Commonwealth and State Government contractual arrangements;
- 2 the meaning and definition of section 51(xxxi) of the Constitution relating to the acquisition of property on just terms;
- 3 the role of natural justice in World Heritage management; and
- 4 the revocation of mining leases under the Mining Act 1929 (Tas).

HISTORY AND BACKGROUND

WORLD HERITAGE MANAGEMENT IN TASMANIA

Tasmania did not have a final and approved Management Plan for its World Heritage areas until 30 September 1992, despite the fact that the first World Heritage area in Tasmania was listed approximately 10 years earlier.¹ The purpose of a management plan for the World Heritage area is to provide the framework for the conservation and preservation of the area, both in the short and long term, including the management of resources and use of the area.

The approval of both the Commonwealth and State Governments was required to implement the Management Plan. The Management Plan was prepared pursuant to the National Parks and Wildlife Act 1970 (Tas). It was approved by the Tasmanian World Heritage Area ('TWhA') Ministerial Council on 8 July 1992. The Management Plan was approved by the Governor-in-Council on 14 September 1992 and took effect on 30 September 1992, seven days after publication of that approval in the Government Gazette.

The Tasmanian Wilderness World Heritage Area ('WHA') encompasses over 1.38 million hectares. After the first nomination and listing in 1982, a second area was added in 1989. Formulation of the WHA Management Plan was influenced by the existing draft plans for the area and the existing statutory plans approved under the

¹ The Premier of Tasmania, the Hon. Doug Lowe, wrote to the Prime Minister, the Rt. Hon. Malcolm Fraser, on 22 September 1981, requesting that a nomination be forwarded to the World Heritage Committee for listing. A nomination was submitted on 13 November 1981 and the area was listed by the World Heritage Committee during its meeting from 13 to 17 December 1982.

National Parks and Wildlife Act 1970 (Tas). The WHA Management Plan was prepared on the basis of agreed levels of Commonwealth and State Government recurrent and capital funding for a five year period.

Although it was agreed between the Commonwealth and State Governments that the management objectives for the WHA should be those derived from the World Heritage Convention, ie: to protect, conserve, present, etc. (as per Articles 4 and 5) there are no specific legislative or administrative guidelines indicating what should or should not be included in a WHA management plan. In addition, there are no provisions in the World Heritage Properties Conservation Act 1983 relating to the methodology of assessing or protecting the competing interests in the WHA. The Management Plan states in its summary section that 'it has been prepared under the National Parks and Wildlife Act 1970 to provide a framework of objectives and policies ... to be adopted by the Department of Parks, Wildlife and Heritage for the five year period following approval of it.' ²

The rationale for preparing the document is set out on page ii of the Management Plan:

This Management Plan for those parts of the Tasmanian Wilderness World Heritage Area reserved under the National Parks and Wildlife Act 1970 has been proposed in accordance with the requirements of Part IV of that Act. The draft plan was released for public comment and review by the National Parks and Wildlife Advisory Council from 27 June 1991 until 27 September 1991.

Accordingly, it is clear that there is no legislative or administrative requirement to specifically prepare a detailed Management Plan, but the Operational Guidelines for the World Heritage Convention itself encourages signatories to the Convention to prepare such plans. In Tasmania's case, a majority of the area concerned was already part of the State's state reserves and as such was managed for that purpose.

Apart from what may be negotiated at a political level between two Ministers of Government, often of differing political persuasions, there is no legislative or administrative framework to precisely prepare and implement the World Heritage management plan which currently has an impact on 1.38 million hectares or 20% of Tasmania. ³ The difficulties inherent in any such 'negotiation', together with the

² Summary section, p. vii.

³ As at 1 January 1993.

problems of balancing the competing interests, has been a major reason why the final Management Plan was not completed for nearly 10 years.

The Management Plan states 'the principal strategy for protecting and conserving natural resources is to retain the majority of the area free from disturbance and development'.⁴ But it also provides that exploration and mining may be continued in the Adamsfield Conservation Area. A mine was existing at Adamsfield when the Management Plan was gazetted. The Management Plan also highlights differences of opinion between the Commonwealth and State Governments.

*'It is the Tasmanian Government's policy to allow mineral exploration in the World Heritage Area State Reserves, proclaimed since May 1989. However, this proposal is unacceptable to the Commonwealth Government. The Tasmanian Government will continue to pursue its intent.'*⁵

Because the Commonwealth Government provides the majority of the funding,⁶ and owing to its increased powers over World Heritage Areas, it is in a dominant position with respect to land use planning and management matters.

With specific reference to the Bender's Quarry operation, the Management Plan states 'The Commonwealth Government has acted by proclamations and regulations under the World Heritage Properties Conservation Act 1983, to prohibit, except with the consent of the Federal Minister in writing, operations for the mining of limestone within Mining Lease 69M/81 at Marble Hill. Rehabilitation, safety and other matters associated with closure of the quarry will be the subject of further negotiations between the Commonwealth and State Governments'.⁷ It is this action by the Commonwealth which is the subject of the last three sections of this chapter. The fact that specific reference is not made to 'compensation' in the last sentence of the above quote is of concern in light of the agreement made between the Commonwealth and State Governments, dated 28 November 1988. Before addressing these matters, the following explains the history of Bender's limestone quarry.

⁴ Summary section, p. vii.

⁵ p. 1.

⁶ 'In general terms, the agreement involved the provisions of \$11 million by the Commonwealth and \$5 million by Tasmania (in real terms) over the five-year period 1987/88 to 1991/92 for the recurrent expenditure and minor capital works.' (TWHM Management Plan, p. 10).

⁷ p. 1.

HISTORY OF BENDER'S QUARRY

The first quarry in the Lune River area, south-west Tasmania, was known as Blayney's quarry. It was located approximately one kilometre west of the present Bender's Quarry and 100 metres from Exit Cave. It was worked from 1930 to 1959 without any identifiable damage to that cave. Bender's limestone quarry, at Ida Bay, Lune River, was started in the early 1950s and the lease was taken over by the Bender family in 1975. The quarry was operated by Benders Spreading Services Pty Ltd, a family company, from 1975 until its closure. The quarry was closed by the Federal Government on 20 August 1992.

In the period since 1975, the quarry was worked as a source of crushed limestone, agricultural lime and road construction materials. The major outlet was for the supply of high grade limestone to the Pasminco-EZ refinery at Risdon. Until its closure, it was the major source of limestone in southern Tasmania, producing some 25,000 tonnes annually.⁸

The Bender's Quarry operations fell within the definition of 'scheduled premises' in the Environment Protection Act 1973 (Tas). The granting of a licence by the Director of Environmental Control for the quarry to operate as scheduled premises was required by section 24 of that Act. The Director may seek to impose conditions, limitations and restrictions on that licence to operate. Bender's Pty Ltd obtained a licence to operate subject to certain conditions.

The National Parks and Wildlife Act 1970 (Tas) established the National Parks and Wildlife Service under the control of a Director, who is responsible to the Minister for the administration of the service.

Section 13 of the Act provided for land to be set aside for various purposes, including 'national park or public recreation, preservation or protection of flora or fauna, natural beauty or scenic interest, aboriginal relics and management and taking of game'. This purpose is referred to as a 'conservation purpose'. Where the 'Governor' (State Government) is of the opinion that any land should be set aside for a conservation purpose he may, by proclamation, declare that land to be a conservation area.

⁸ At the time of the initial closure. In the years preceding this, it produced some 40,000 tonnes annually, and during the 1970s up to 55,000 tonnes annually.

A conservation area was declared by Proclamation and notified in the Gazette on 27 June 1990. This proclamation declared 77 hectares of Crown land in the land district of Kent to be the 'Marble Hill Conservation Area'. This area was also within the World Heritage Area listed in November 1989. Land within a conservation area is referred to in section 15(6) of the Act as 'reserved land'. Section 22 provides for the Director to be the managing authority of reserved land, other than land in a local reserve or private reserve, to which a forest management plan applies.

Under Section 21 of the Act, exploration and mining may be provided for under a management plan, if that plan is approved by the Governor and a resolution of both Houses of Parliament. A resolution pursuant to section 21(2) and (3) was approved by both Houses of Parliament. The mineral lease between Benders Spreading Services Pty Ltd and the State Government (No. 69M/81) covered an area of 487 hectares. The lease was due to expire on 1 June 2003 and was renewable. Of the 487 hectares leased, only about 10 hectares were directly subject to quarrying or were occupied by infrastructure, such as the crushing plant, sheds or roads. Under the lease, Benders Spreading Services Pty Ltd held a licence under the Environment Protection Act 1974 (Tas), which authorised quarrying and processing at the site. The Department of Mines is responsible for the granting of mining leases and for compliance with the Mining Act 1929, the Mines Inspection Act 1951 and regulations made thereunder.

On at least two occasions, the Tasmanian Government Minister for Mines said the mining lease had been breached or was inoperative because of the actions of the Commonwealth Government.⁹ An acknowledgment of the closure of the quarry, no matter which Government may have caused the closure, would suggest an immediate right to compensation by the lessee of the mining lease. This is discussed below.

The development and operation of the quarry was to be in accordance with the Environmental Management Plan ('EMP') which was used to identify appropriate conditions for the operation of the quarry. The EMP is controlled by the provisions of the Mining Act 1929 (Tas), the terms and conditions of the Mineral Lease and the Scheduled Premises licence conditions. The responsible Departments were the State Department of Mines, the Department of Environment and Planning and the Department of Parks, Wildlife and Heritage.

⁹ Media releases dated 4 September and 7 September 1992 are set out in the appendix.

The EMP (prepared in December 1991 as a basis for considering future operations) was prepared at the request of the managing authority, the State Department of Parks, Wildlife and Heritage, and was approved by both the State and Commonwealth Governments. It was to be regularly updated and reviewed by the relevant government departments. The operations at the quarry were monitored to ensure compliance with both the WHA Management Plan and the EMP. The EMP provided mining could continue at the quarry subject to specified limits.

JOINT MANAGEMENT ARRANGEMENTS

On 1 March 1985, the Commonwealth and State governments agreed on joint management arrangements for the south-west WHA. The agreement provided for the setting up of:¹⁰

- A Council of Ministers (known as the Tasmanian WHA Ministerial Council which has two representatives from the Commonwealth and State Governments);
- A Standing Committee (comprising representatives from Commonwealth and State Government Departments); and
- A Consultative Committee (comprising 15 members with half appointed by each government).

The Council of Ministers was created to advise both governments on:

- Management plans for the WHA;
- Management requirements;
- Annual and forward programs of expenditure for capital and recurrent costs of managing the WHA and development of appropriate infrastructure, accommodation and facilities; and
- Scientific studies in relation to matters of natural and cultural significance.

¹⁰ Department of Parks, Wildlife and Heritage, Tasmanian Wilderness World Heritage Area Management Plan, (1992), p. 9.

The Standing Committee advises the Council of Ministers and oversees policies, programs, funding arrangements and the administration and preparation of management plans for the area.

The Consultative Committee's role is to provide advice to the Council of Ministers and the Standing Committee on matters relating to the development and management of the WHA.

In Tasmania, the primary management agency for the WHA was the State Department of Parks, Wildlife and Heritage. This was because the majority of the land within the WHA is reserved under the National Parks and Wildlife Act 1970 (Tas).¹¹ However, the Forestry Commission was given authority to manage three forest reserves, the Hydro-Electric Commission for certain areas and private land owners for 300 ha of private land.

PRELUDE TO THE CLOSURE OF BENDER'S QUARRY

THE 1988 COMMONWEALTH/STATE HEADS OF AGREEMENT

Following the bitter and lengthy Lemonthyme and Southern Forests Inquiry (the 'Helsham Inquiry')¹² and the High Court decision in the Tasmanian Forests Case,¹³ the Commonwealth and the State of Tasmania signed Heads of Agreement on 28 November 1988 which were intended to resolve the remaining concerns arising out of the Inquiry. The Agreement,¹⁴ which is set out in the appendix, endorsed a Commonwealth/State Forest Industry Package (dated 24 November 1988), commonly referred to as the Cook/Groom Agreement, which provided, inter alia, for payment of compensation to the Tasmanian Government and forest industry for the loss of the forest resource as a result of the Helsham Inquiry and the subsequent decision by the Commonwealth Government to nominate a further 600 000 ha of Tasmania for World Heritage listing.

¹¹ *ibid.*, p. 10.

¹² Pursuant to the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Commonwealth).

¹³ *Richardson v the Forestry Commission (Tas) and Another* (1988) 164 CLR 261.

¹⁴ Commonwealth and Tasmanian Heads of Agreement, 28 November 1988.

The Heads of Agreement were in thirteen parts and a number of these had implications for existing and future World Heritage listing procedures in Australia. The most significant effects of the Agreement with respect to Tasmania were as follows:

1. The Commonwealth and State Government would jointly nominate for World Heritage listing the area known as 'The Hole in the Doughnut'.
2. The Commonwealth agreed to provide the proposed Huon Forest Products woodchip mill with a woodchip export licence.
3. The Commonwealth agreed to an increase in the sustainable yield of pulpwood from Tasmanian forests.
4. Both Governments would make every endeavor to develop access to alternative veneer resources, new products and markets.
5. The Commonwealth agreed to provide a package totaling \$50 million to the Tasmanian Government and forest industry provided over a five year period beginning on 1 January 1989.
6. The Commonwealth agreed not to initiate any further inquiries into forestry in Tasmania or to propose any other areas of Tasmania for World Heritage listing without the concurrence of the Tasmanian Government (emphasis added).
7. The Commonwealth agreed that logging could continue in National Estate areas subject to the consultative arrangements in place at that time and any future arrangements made between the Commonwealth and Tasmania.

Although these were the essential points to the Heads of Agreement, both Governments also agreed to the following:

The Hole in the Doughnut is to be the subject of State protection as a National Park.

At the date of the Agreement, the 'Hole in the Doughnut' was not a National Park under Tasmanian legislation.

Two points can be made in regard to these features of the Agreement. Firstly, this area which was to be nominated for World Heritage listing had not received special acknowledgment and was not recognised as having special heritage significance by the State Government prior to the decision to nominate, ie: it had not been dedicated a state reserve. Secondly, there was no management regime in place prior to the decision to

nominate. In fact, reference to the management of this proposed World Heritage Area was referred to in the Agreement as follows:

*Questions relating to the management, funding and related matters are to be the subject of further discussions. The Commonwealth will provide funding support, the precise level being the subject of further discussion in the normal context of the current management arrangements for the existing World Heritage area.*¹⁵

Before an area is recognised as being of outstanding universal cultural or natural significance, it is submitted that it should be recognised at a State or local level as holding some conservation quality and thus be subject to the relevant management plan. Certainly, without the appropriate recognition at a state or local level, it is highly unlikely a management regime would be in place prior to listing.

It is of special interest that the Commonwealth agreed not to initiate any further inquiries into forestry in Tasmania or to propose any other areas of Tasmania for World Heritage listing without the concurrence of the Tasmanian Government. The Australian Heritage Commission has an ongoing responsibility to identify and assess areas listed or nominated for the National Estate. Accordingly, it could be argued that the Commonwealth Government in entering into the Agreement was ignoring its responsibilities and obligations under the World Heritage Convention. On the other hand, the very fact that the Commonwealth Government has entered into such an Agreement with the Tasmanian Government, augurs strongly for the making of a similar agreement with every State and Territory in Australia. However, as will be demonstrated, the commitment by the Commonwealth Government to abide by its written undertaking, was soon discarded.

The Cook/Groom Agreement signed by Senator Cook, Federal Minister for Resources, and Hon. Ray Groom, MHA, State Minister for Forests, was specifically endorsed pursuant to clause 9 of the Heads of Agreement. Clause 16 of the Cook/Groom Agreement made a specific reference to the ongoing mining operations at Bender's quarry. It provided as follows:

¹⁵ Clause 1.

The Commonwealth agrees that the operation of Bender's Quarry within the Exit Cave area, nominated for World Heritage listing, can continue provided that acceptable limits are set to the scale and development of the operation. Should any financial loss result or any limits be placed on the operation, the Commonwealth will pay compensation directly to the company concerned.

Thus it was agreed as late as November 1988, and following a full and comprehensive assessment, that mining could continue at Bender's Quarry.

Clause 17 of the Cook/Groom Agreement referred again to the possibility of continued mining within the World Heritage Area and the consideration of compensation for the refusal to mine. The Clause provided:

The Commonwealth agrees with the issue and maintenance of mining and exploration titles in the area nominated for World Heritage listing. Any mining development in the area nominated for World Heritage listing from an existing or future lease holder would be subject to a judgment from the State and the Commonwealth that the planned operation was compatible with the World Heritage values of the area. Should the Commonwealth in the future refuse any mining proposal in an area nominated for World Heritage listing, compensation will be considered for any financial loss resulting to the State Government and Tasmanian business.

Clause 17 provided that, under certain circumstances, mining and mineral exploration would be appropriate. Furthermore, Clause 18 provides:

The Commonwealth will raise no objection for State plans for a geological survey of the areas nominated for World Heritage listing ... the Commonwealth indicates its willingness to assist with that survey.

It would be a reasonable expectation that if a geological survey is not only allowed but provided for specifically in the Agreement, then further mining and mineral exploration activities may ensue in the future, subject to appropriate environmental and safety guidelines as jointly agreed. If the Commonwealth believed differently, it did not include such a belief in the Agreement.

The Hon. Ray Groom, the then State Minister for Forests, said in a media release, dated 29 November 1988, relating to the Agreement:

In the past twelve years there have been ten inquiries into forestry in Tasmania. It has been a debilitating and frustrating time for the industry, particularly in the last three years, when it seemed that environmentalists and elements of the Federal government were setting out to wreck the forest industry in Tasmania.

Nevertheless, the Cook/Groom Agreement was not only signed by two senior Cabinet Ministers from the Commonwealth and State Governments, but it was also specifically endorsed (in Clause 9) by the signatories to the Heads of Agreement, the Rt. Hon. R J L Hawke as Prime Minister, the Hon. Graham Richardson as Federal Minister for Arts, Sport, the Environment, Tourism and Territories, the Hon. Robin Gray, as State Premier, and both Messrs Cook and Groom. The agreements were apparently signed in good faith with the intent to be legally binding. (The status of federal and state contractual arrangements is considered in further detail below.)

Furthermore, in a letter dated 18 August 1988 to Mr Bender, Senator Peter Cook, as Minister for Resources, gave the following assurance:

I can assure you that the question of continued operation of your quarry has been fully discussed with Senator Richardson, that the maintenance of the quarry was included in the industry package which I submitted to Cabinet, and that no member of Cabinet at any stage has raised any objections to the continued operation of your quarry.

I can assure you officially and conclusively that the Commonwealth does not object to your continued mining of limestone from the quarry in the Exit Cave qualifying area. ¹⁶

Mr Bender received a similar assurance from the then State Premier, the Hon. Michael Field, that continued mining of limestone from the quarry would be allowed. Mr Field wrote on 8 June 1989, giving the following assurance:

Under the incoming Labor Government, you will be able to continue mining limestone at the quarry as previously agreed between the State and Federal Governments. ¹⁷

Mr Bender accepted the Cook/Groom Agreement and the subsequent listing of World Heritage in addition to the other agreements and promises made by both State and Commonwealth Governments in good faith. He operated under voluntary limits to the quarrying operation from August 1989 as a result of a number of studies commissioned by the State Government, and agreed to by both the State and Commonwealth Governments. Mr Bender received compensation on account of these limitations –

¹⁶ The letter was extensively quoted in 'An Appeal for Support' a submission by Ray Bender, dated September 1992, widely distributed throughout Tasmania and the mainland and available at State Government Departmental libraries at pages 1 and 7.

¹⁷ *ibid.*, at pages 1 and 7.

compensation paid by the State Government and endorsed by the Commonwealth Government.

PRODUCTION AND SALES

Pasminco Metals – EZ (Pasminco) Ltd, located in Hobart, purchased limestone for use as a neutralising agent in the production of zinc. In past years, EZ used limestone at a rate of 105 tonnes per day or approximately 40,000 tonnes per annum.¹⁸ At the time of the initial closure of the quarry (20 August 1992), the limestone usage was approximately 65 tonnes per day, or approximately 25,000 tonnes per annum.

Limestone was also supplied as ground stone for agricultural use. The market in 1991/92 was 5,000 – 6,000 tonnes per annum supplied to orchardists and farmers. The Huon district accounted for 3,000 – 4,000 tonnes per annum, and the Coal and Derwent River districts, the Tasman Peninsula and Southern Midlands accounted for the balance.

Seven thousand tonnes per annum of stone was supplied, primarily to local municipalities, as a road construction material and for drainage purposes. In addition, the limestone has been used in panels for buildings, eg: the new headquarters for the ANZ Bank in Elizabeth Street, Hobart; glass making; and animal food mixtures.

As well as the current markets, there were possible annual markets for burnt lime of approximately 8,000 tonnes to Australian Newsprint Mills (ANM) and 3,700 tonnes to Pasminco – EZ. There was also the possibility of supplying an additional 10,000 tonnes to a new development at Boyer, southern Tasmania.¹⁹

Benders Pty Ltd received orders for limestone on a consistent basis following its initial closure on 20 August 1992. These orders were unable to be met.²⁰

With regard to the quality of the limestone, the EMP provides:

¹⁸ Environmental Management Plan, page 1.11.

¹⁹ 'An Appeal for Support', a submission by Ray Bender dated September 1992 at page 11. To supply these markets, Benders Pty Ltd was intending, by 1994, to install a calcining plant which would have required an additional 40,000 tonnes of limestone. The total cost of this development, as at August 1992, was estimated by Benders Pty Ltd to be approximately \$2 million.

²⁰ Following the initial closure on 20 August 1992, Bender's Pty Ltd lost a contract with the State Government Department of Construction to supply 7,000 tonnes of crushed limestone at Dover in southern Tasmania. 'An Appeal for Support', submission by Ray Bender, dated September 1992, at page 11.

A minimum grade of 89% calcium carbonate is currently required for the Pasminco contract. Penalties are payable for calcium carbonate of less than 89%, and a rejection limit of 85% applies.

Magnesium content is critical to Pasminco, as an increase in magnesium content reduces the energy consumption efficiency. The limestone typically contains 0.65% magnesium, and this is considered by Pasminco to be the maximum acceptable.

... The new contract with Pasminco calls for a calcium carbonate content of not less than 94%, with a magnesium content of not more than 0.4%.

*The grade of calcium carbonate in agricultural lime is not so critical, although its value depends on carbonate content.*²¹

Accordingly, it was obvious that limits on the mining operation by Benders Pty Ltd could materially affect the quality of limestone and, therefore, the remuneration received from Pasminco.

At the date of the initial closure, five people were employed at the quarry and another three were engaged in the transport of material from the site. In addition, several other people within the Bender's group of companies were directly affected. However, the impact on employment goes far beyond this. For example, the then Warden of Esperance (in southern Tasmania), Cr. Greg Norris, said in a media statement on 1 September 1992:

*... nearly half the people of the Huon region have been, and will be, directly and indirectly, impacted by the closure of the quarry ...*²²

This is probably an exaggeration to some degree but nevertheless points to the fear in the community of the negative effects of the quarry's closure.

CLOSURE OF BENDER'S QUARRY – ECONOMIC IMPLICATIONS AND AVAILABLE ALTERNATIVES

Following the signing and endorsement of the Cook/Groom Agreement, the State Government reviewed the economic implications of the closure of Bender's quarry.

²¹ Environment Management Plan, December 1991 at page 1.10.

²² Media release, Cr. Greg Norris, dated 1 September 1992, issued to all southern media and referred to in 'An Appeal for Support', submission by Ray Bender dated September 1992 and widely distributed throughout Tasmania and the mainland at page 2.

A Report prepared by the Tasmanian Department of Resources and Energy in 1990 entitled *Economic Implications of the closure of Bender's Quarry, Lune River*, stated that:

Compensation is assessed at the net present value of future net earnings, the amount of compensation is estimated to be of the order of \$4 million and in the range of \$3 million to \$5 million. ²³

The Report went on to say:

In addition, the transport disadvantage alone would impose extra costs of some \$75,000 to \$100,000 per annum on Pasminco - EZ, and \$100,000 per annum on users of agricultural lime currently supplied by the Newlands Quarry if these markets were met by more than producers. ²⁴

Accordingly, if the quarry was closed, both the State and Commonwealth Government and the public had reason to believe the compensation payable would be in the order of \$4 million. This assumption was based on Clause 16 of the Cook/Groom Agreement, the State Department of Resources and Energy Report, and the compensation payments that had previously been paid to Benders Pty Ltd by the State Government with the Commonwealth Government's full knowledge because of limitations on the quarrying operations.

The Tasmanian Government's Department of Environment and Planning produced an Assessment Report on Bender's Quarry, Quarry Development and Environment Management Plan in February 1992. The Report presented a number of options for the future of the quarry including i) ceasing immediately; ii) continuing for a limited period then leasing an alternative site; and iii) continuing as proposed under the Environmental Management Plan, ie: for 50 years. The Report provided:

²³ *Economic Implications of the closure of Bender's Quarry, Lune River*, Tasmanian Department of Resources and Energy, 27 November 1990, page 4.

²⁴ *ibid.* at page 40.

*Compensation to Bender's Pty Ltd (of the order of \$4 million and within the range \$3 million to \$5 million) would not eliminate the socio-economic impact on the local area of quarry closure. Employment will be reduced and there will be a greater cost to orchardists and farmers for supplies of agricultural limestone. The Department of Resources and Energy Report (1990/29) estimated the additional cost to farmers to be about \$100,000 per year if the lime were to be supplied by northern producers. If lime is not used because it is too expensive to purchase from the north of the State, agricultural productivity will, presumably, decrease. The Governments may need to give consideration to means of offsetting these effects.*²⁵

It emphasised the probability that compensation would be paid if the quarry ceased to operate. The many references to the economic and social impact were revealing.²⁶

The full Report was made available to the public and to the Commonwealth. The Commonwealth had knowledge of the consequences of any action it might take in either limiting or ceasing operations at the quarry.

The second option was the lease of an alternative comparable resource and payment for relocation, re-establishment and appropriate compensation, if applicable. An acceptable alternative quarry site may have existed at Risby's Basin, two kilometres South West of Maydena in Southern Tasmania. This option necessitated expense in relocation of plant and equipment and establishment of a quarry site on land which may have to be purchased or leased. The alternative site was in the town water supply catchment, and conservation values were and are unknown. Further studies were undertaken to ensure the site could support a quarrying operation, with a time frame for exploration, quarry design, gaining of development and approvals and production estimated at approximately 12 to 18 months, but at a minimum of nine months. This time frame would ensure the loss for Benders Pty Ltd of the Pasminco-EZ contract if

²⁵ Assessment Report on Bender's Quarry, Quarry Development and Environmental Management Plan, Tasmanian Government Department of Environment and Planning, February 1992, at page 28.

²⁶ Immediate closure of the quarry would also have an adverse impact upon Pasminco Metals - EZ. The extent of this impact is not apparent as it would depend on the additional cost of obtaining suitable material from an alternative source. The Department of Resources and Energy Report 1990 estimated this to be in the order of \$75,000 - \$100,000 per year if the material were obtained from Mole Creek and to cost up to an additional \$4 per tonne to transport.

There will clearly be some flow-on effects from the direct socio-economic impact identified above, but the extent or significance of these is difficult to predict.

Under this scenario, a Rehabilitation Plan would have to be prepared for the quarry and implemented. It is important to note that this would have to include making the quarry safe by way of the removal of high bench faces. This process would produce rock suitable for crushing and sale, although the quantities and grades have not been calculated. If the quarry were closed immediately this material would be wasted, (emphasis added), *ibid.* page 29.

contingency plans were not implemented to continue their supply. Various conservation and green lobby groups foreshadowed their opposition to quarrying at the Maydena site.

This second option, considered in the State Government's Assessment Report, provides:

*As discussed in the section on alternatives, the most prospective area for relocation is near Maydena. Although an alternative quarry site has not yet been identified, the Director of the Division of Mines and Mineral Resources is confident that one can be found within a period of 6 - 12 months. A further 6 - 9 on Bender's Quarry, Quarry Development and Environment Management Plan referred to above. The Report provides 9 months would probably be required to get all necessary approvals in place, relocate/establish equipment and carry out site preparation works. Hence, the earliest that a new site could commence production would be 12 months from a decision in favour of this option, while a more realistic time-frame would be 18 - 24 months.*²⁷

To be effective, this option would have to be negotiated with, and agreed to by Bender's Pty Ltd. Controls on the short term operation of the quarry could be effected through the Licence to Operate Scheduled Premises, although these would be subject to appeal. Presumably, if the controls were rational and justifiable, they would be upheld by the Appeal Board. If appealed, the conditions would not apply until the appeal was resolved.

This option was also considered and costed in the Department of Resources and Energy Report Economic Implications of the closure of Bender's Quarry, Lune River dated 27 November 1990.

The State Government's Assessment Report estimated the cost of relocation at some \$682,000.²⁸ This estimate did not include the following:

- purchasing or leasing a new quarry site
- loss of royalties of \$16,000 p.a. to the Tasmanian Government
- relocation of four to six families
- lost production time and loss of profits
- commissioning problems and the relocation of the Maydena town water supply.

²⁷ Assessment Report on Bender's Quarry, page 29.

²⁸ op. cit. page 6.

- imposition of a toll for ANM roads leading to the Maydena site

The Report anticipated the above to exceed \$1 million.²⁹

Continued operations within the confines of the quarry, subject to and conditional upon strict environmental and safety guidelines in accordance with the EMP was a third option open to the Federal Government. The Hon. Ros Kelly, the Commonwealth Minister for the Environment and the State Minister for the Environment, the Hon. John Cleary, appeared to be pursuing this option in accordance with an independent Report on Exit Cave prepared by Professor Ollier.³⁰ Details of this report are set out below.

Professor Ollier said in his report:

*The studies so far suggest that blasting has not had an adverse effect on the caves. Obviously blasting is carried out for the express purpose of shattering rock, and if a cave were too close it would be damaged. But there are reports of caves fairly near the quarry where any rock fall is older than the quarry and even delicate straw stalactites have survived. Perhaps, therefore, small blasts could be tolerated in the future.*³¹

Professor Ollier went on to comment on the impact of quarrying:

The report of John Miedecke and Partners Pty Ltd claims that the quarry 'has operated for some 43 years, without any identifiable impacts to Exit Cave'. Other reports claim considerable impacts. From my reading of available documents I believe there have been some impacts, but they may have been exaggerated. After 43 years of quarrying, a few more months of environmentally-careful quarrying are not likely to have a significant environmental impact. (emphasis added)

*I believe it should be possible to quarry a further 20,000 tonnes of limestone from the Mt Ida Quarry with negligible further impact on the World Heritage values of the Exit Cave System.*³²

This independent study appears to have made it clear that further limited or restricted quarrying would not have an adverse impact on Exit Cave. At the very least, a phased-

²⁹ op. cit. page 4.

³⁰ Professor C D Ollier, DSc, FRGS, was appointed by the Hon. Ros Kelly as an independent expert to review all existing information and provide a 'Report on Exit Cave' available at the Department of Parks, Wildlife and Heritage Hobart library.

³¹ Professor Ollier's report, pages 2 and 3.

³² Professor Ollier's report, page 8.

out approach appeared preferable.³³ Notwithstanding Professor Ollier's report Mrs Kelly unilaterally, on 20 August 1992, without notice to the owner, Mr Ray Bender, closed the quarry. A copy of the Minister's media releases dated 20 August and 3 September 1992 are set out in the appendix. In response to Mrs Kelly's decision, the State Government Minister for the Environment, Mr Cleary, said in Parliament a few days later:

*All rehabilitation of the site has been stopped. In Professor Ollier's Report to the Federal Government, he indicated that there was a tremendous risk of damage by leaving the upper benches as they were and that the clay deposit in the upper benches could well end up in the karst system. And that is the only issue that was likely to cause any damage to the Exit Cave system. Blasting was not an issue; all the experts agreed on that. The issue was that the clay deposits in the upper layers of the quarry could end up being washed through the karst system. We now have a situation where the quarry is locked up by an action of the Federal Minister with the clay sitting up on benches. Any heavy rainfall at that quarry could well end up causing far more damage than any rehabilitation plan or operation of the quarry.*³⁴

Concluding this assessment of the third option available with regard to continued operations under strict guidelines, the State Government's Assessment Report stated:

*This is the only option which would not have some negative social and economic effects on the Huon region.*³⁵

Accordingly, it is submitted that the Commonwealth and State Governments had before them all the relevant information on which to base a decision. The implications with

³³ Of the two possible areas for further quarrying, the high level area presented some small risk of pollution. The low level area had little risk of polluting Exit Cave, although it may have polluted Bradley Chestermans Cave to some extent.

This independent study appears to have made it clear that further limited or restricted quarrying would not have had an adverse impact on Exit cave. At the very least, a phased-out approach appeared to be preferable.

The High Level Area

This is the area most likely to have had an adverse impact on Exit Cave, but, if care were taken to keep clay and drainage water out of the sinkholes, it should have been possible to extract a small amount of limestone, to reduce the benches to a 5 m height, so as to improve the aesthetic values after regeneration.

The Low Level Area

Quarrying here would not have adversely affected the World Heritage values of Exit Cave, and could have been permitted. Of course, pollution and waste disposal would have had to be carefully controlled to cause as little impact as possible on Bradley Chestermans Cave and elsewhere. The excavation work would have had to aim at leaving the quarry with benches of a suitable size for aesthetically acceptable regeneration. Professor Ollier's report, at page 8.

³⁴ Hon. John Cleary, House of Assembly Hansard, 25 August 1992, page 54.

³⁵ Assessment Report on Bender's Quarry, Quarry Development and Environmental Management, Tasmanian Government Department of Environment and Planning, February 1992 at page 31.

respect to compensation appeared, at least in the broad sense, to be clear. If the quarry was closed the owner would be entitled to between \$3 and \$5 million, and substantial amounts would be required in transport subsidies and other social welfare payments.

COMPENSATION

At the request of the State Department of Parks, Wildlife and Heritage between 1989 and August 1992 Bender's Pty Ltd incurred additional costs by altering and confining its quarry operations at Ida Bay. Bender's Pty Ltd prepared a revised extraction strategy for the quarry which was acceptable to the State and Federal Government managing authorities. It was compensated for these limitations and restrictions through an ex gratia payment from the State Department of Parks, Wildlife and Heritage. \$313,000 was paid to Bender's Pty Ltd by them for compensation relating to restrictions and limitations on its operations for the period to August 1992. The Hon. Ros Kelly and the Federal Government knew of these payments and agreed to them being made.³⁶ Several of these payments were made between August 1989 and December 1991. Accordingly, if the Commonwealth consented to compensation being paid at this time for limitations on the quarry operations it raises a question as to why it would deny that the owner had compensation claims following the complete closure of the quarry.

The Hon. John Cleary, the State Minister, said in the debate in the House of Assembly in relation to this previous compensation payment:

... That is not all. We have already spent over \$300,000 which has been paid to the operator of the quarry for remediation and other work that he has to do to comply with environmental guidelines. As my colleague quoted earlier, that was specifically covered in the Agreement that was signed by the Commonwealth and the State in 1988, which said that if any remedial or environment work needed to be done by the operator, that would be directly reimbursed by the Commonwealth. Did that happen – no. Over \$300,000 has already been taken out of Tasmania's allocation – that was approved by the previous Minister – and this was funding that should have been spent on doing much-needed work within the World Heritage area.³⁷

³⁶ 'Appeal for Support' submission by Ray Bender dated September 1992 at page 18.

³⁷ House of Assembly Hansard, 25 August 1992 at page 51.

The Tasmanian Minister confirmed the compensation was due and payable, with the consent of the Commonwealth, despite the fact that it was drawn from Tasmania's world heritage allocation funds. In June 1992, the Hon. Ros Kelly wrote to the Federal Minister for Finance seeking additional money for the Commonwealth contribution to the cost of relocating Bender's Quarry. In her letter, which is set out in the appendix to this thesis, she said, *inter alia*:

I have been advised by the Attorney-General that, whilst there may be no legal imperative on the part of the Commonwealth to pay compensation to Bender's Pty Ltd, the Forest Industry Package may place a political obligation upon the Commonwealth to do so. The Attorney-General further advised that payment of compensation to Bender's Pty Ltd is appropriate.

*At the Ministerial Council Meeting, the Tasmanian Premier, the Hon Ray Groom, MHA, requested the Commonwealth to meet its obligations under the Package and compensate Bender's Pty Ltd with additional funds. The Tasmanian Government is opposed to funds provided for management of the TWWHA (Tasmanian Wilderness World Heritage Area) being used to relocate the quarry and provide for any related employee redundancy costs. It was agreed at the Ministerial Council Meeting that State and Commonwealth officials would review details of all component parts of the relocation costs and report to their responsible Ministers. This has been undertaken and, consistent with the Ministerial Council decision and the Attorney-General's advice, I now seek \$476,000 for relocation costs for Benders Pty Ltd, including \$425,000 for the quarry relocation and \$51,600 for employee relocation costs.*³⁸

The letter reveals advice from the Attorney General that there is no legal imperative on the part of the Commonwealth to pay compensation, despite the signing by the Commonwealth Minister of the Cook-Groom Agreement. It is this legal advice which is in dispute and is considered in further detail below. It is interesting that the State Government believed or assumed that the owner was entitled to compensation from the Commonwealth. The Tasmanian Parliament debated, on 25 August 1992, the issues raised in the Hon. Ros Kelly's letter to the Hon. Ralph Willis. The House of Assembly debated and passed the following motion proposed by the Hon. Michael Hodgman, MHA on behalf of the Liberal State Government:

³⁸ Letter from the Hon. Ros Kelly to the Hon. Ralph Willis, dated June 1992, set out in the appendix to this thesis.

That this House censures and condemns the Keating Labor Government for its disgraceful action in unilaterally closing down Bender's Quarry and once again trampling over Tasmania in an unconstitutional manner, and in particular –

- tearing up a properly executed formal legal agreement between the State of Tasmania and the Commonwealth of Australia dated 24 November 1988; failing to give the company any advance courtesy notice of its peremptory closure;*
- failing to provide sufficient compensation to the company;*
- failing to provide adequate funding for relocation and the provision of employment for those who have been thrown onto the unemployment scrap heap; and*
- failing to give recognition and effect to the expert consultant's report of Professor C D Ollier and, in place of that report, implementing a purely party political exercise in an attempt to secure the environmental preference votes in metropolitan electorates outside Tasmania..*

*Further, this House censures and condemns the Tasmanian Parliamentary Labor Party for supporting the aforementioned disgraceful actions of the Keating Labor Government and for again supporting the member for Denison, Dr Bob Brown, and the Greens.*³⁹

It is disappointing that the motion did not clearly address the legal rights of the quarry owner to compensation. The reference to the Commonwealth Government's failure to provide sufficient compensation is deceptive in that it gives the reader the expectation some compensation for closure has been paid. No compensation for closure was paid and, importantly, the Commonwealth denied any liability to pay such compensation. However, the Hon. John Cleary, the State Minister for Environment and Planning, during debate in Parliament, commented on the legal aspects of the closure and the requirement to pay compensation. His remarks follow:

³⁹ House of Assembly Hansard, 25 August 1992, page 16.

*I believe that Ray Bender has a very good case for compensation by the Federal Government. It is all very well and good for the Commonwealth to say that it does not accept that, but that person had a legal lease on a quarry and the lease continues to beyond the year 2000. It was not his decision to declare the area as World Heritage but the Commonwealth's, and I believe it should meet its full responsibility, both moral and legal, because this particular person was going about his legal business, operating a resource that has operated at that site for 43 years. It did not happen yesterday; it has been operating for 43 years. I believe the Commonwealth owes Mr Bender an apology in relation to the way it has dealt with this matter and it should be prepared now to sit down with him and look at the question of relocation and proper compensation.*⁴⁰

In summary, the owner had a strong political argument for compensation and, perhaps, a strong legal argument. But the assessment of the legalities of the owner's rights to compensation would be debated in the months and years following closure.

THE BENDER'S QUARRY CLOSURE PROCEDURES

The following points summarise the quarry closure procedures that occurred.

1. The Commonwealth Government acted pursuant to section 6(3) of the World Heritage Properties Conservation Act 1983 (as amended by the Conservation Legislation Amendment Act 1988) and the Governor-General, being satisfied that the identified property was being or was likely to be damaged or destroyed, declared it to be property to which section 9 applied. The proclamation was made on 3 August 1992.
2. Following continued and considerable negotiation between the Commonwealth and State Governments regarding the possibility of further blasting and on-going quarrying, the proclamation was gazetted on 19 August 1992, pursuant to section 3(3). Regulations pursuant to section 21(1) were made prescribing the acts which were thereafter unlawful to be carried out without the consent of the Commonwealth Minister being given under section 9(1). The regulations prevented the following activities except, with the consent in writing, of the Minister:
 - a) excavation works on the relevant property;

⁴⁰ House of Assembly Hansard, 25 August 1992, page 55.

- b) operations for, or exploratory drilling in connection with, the recovery of minerals or stone on the relevant property;
 - c) using explosives on the relevant property; and
 - d) carrying out work preparatory to, or associated with, an act referred to in paragraph a), b) or c).
3. The Hon. Ros Kelly, Minister for the Environment, on 20 August 1992, announced to the media and the public for the first time that the quarry was from that day closed. The proprietor and Manager, Mr Ray Bender, was informed of the decision, initially through a television news bulletin, and the next day, via a letter from the Commonwealth Department.⁴¹ The Minister was required to cause a copy of the proclamation made under section 6 (3) to be laid before each House of the Commonwealth Parliament within 5 sitting days after the making of the proclamation pursuant to section 15(1). The Explanatory Memorandum is set out in the appendix. If the Minister failed to fulfill this requirement, the proclamation ceased to be in force upon the expiration of the last day allowed; as provided by section 15(2). In addition, the proclamation would cease to be in force if either House of the Commonwealth Parliament passed a resolution disapproving of the declaration in the proclamation; pursuant to section 15(3). In determining whether or not to give consent, the Minister was to have regard only to the protection, conservation and preservation of the property; as provided by section 13(1).

Where the Minister refuses to give consent to the doing of any act which has been prescribed by the regulations, the Minister shall:

- a) before the expiration of 7 days after the refusal to give the consent, cause to be published in the Gazette, a notice stating that such consent has not been given and setting out particulars of the acts to which the refusal relates; and

⁴¹ 'An Appeal for Support', submission by Ray Bender dated September 1992 at page 1.

- b) cause a copy of the notice to be laid before each House of Parliament within 5 sitting days after the refusal to give the consent to which the notice relates; as provided by section 13(4)(a) and (b).
4. Mr Bender, through his solicitors (Johnson and Munnings) in a letter to the Minister dated 25 August 1992, requested consent, pursuant to section 9, for blasting and the recovery of stone at the Ida Bay quarry, inclusive of the works set out in paragraphs (a) to (d) of the proclamation. The Minister responded by way of a letter dated 31 August 1992 and stated in part: 'Having regard to these matters [ie: matters set out in section 13(1)], I refuse your client's request for consent to carry out further blasting in the quarry.'. Despite the letter from the Minister being dated 31 August, the refusal was not gazetted until 15 September 1992 and the notice of refusal was laid before both Houses of Parliament on 15 September 1992. ⁴²

THE CONTROVERSIAL LEGAL ISSUES OF THE BENDER'S QUARRY DISPUTE

The events before, during and after the Commonwealth Government's closure of Bender's Quarry in South West Tasmania demonstrate the inadequacy of the World Heritage Properties Conservation Act 1983, with respect to providing compensation to those with some proprietary rights, and management of world heritage areas in general. The events demonstrate the unashamedly political nature of the closure decision and the inadequacy of any workable framework to deal with the consequences of the closure of a mine within a World Heritage Area and, in particular, compensation for not only the quarry owner and employees, but also for the region affected by the closure. The lack of consideration of, or regard for, the economic, social and cultural effects of the closure is startling.

As discussed earlier, the World Heritage Act makes no provision for the payment of compensation to a person or entity other than for the acquisition of property, and this is despite the fact that Clause 16 of the Cook/Groom Agreement clearly indicated that compensation would be payable to the company (Benders Pty Ltd) which suffered

⁴² 'An Appeal for Support', submission by Ray Bender dated September 1992 at page 4.

financial loss from limits placed on its operation. Clause 17 indicated that compensation would be considered for any financial loss that either the State Government or any other Tasmanian business may suffer as a result of the refusal by the Commonwealth of any mining proposal in an area nominated for World Heritage.

The need for these provisions to be included in the Cook/Groom Agreement demonstrates the inadequacy of the World Heritage Properties Conservation Act 1983 to provide compensation for the party, or parties, directly and adversely affected by world heritage listing or management. In addition, it demonstrated that the Act is silent with respect to compensation for those people or entities indirectly affected by world heritage listing and world heritage management; eg: employees of the business affected or farmers disadvantaged by increased transport costs.

Clause 17 of the Act provides that compensation may be payable where property has been compulsorily acquired, or where property has been acquired 'otherwise than on just terms'. The compensation provisions of the Act are overly restrictive and burdensome on those who suffer detriment and yet can not, or can not afford, to prove that their property has been 'acquired' by the Commonwealth, that the value of their assets has depreciated or that they have been disadvantaged in some way from the listing or management procedures. No mechanism exists for the full and comprehensive consideration of compensation for the detrimental economic, social, cultural and other consequences of a Commonwealth Government decision to list an area for world heritage or, indeed, the consequences of decisions made by the world heritage managing authorities.

The Act provides in section 13(1) inter alia: 'the Minister shall have regard only to the protection, conservation, and presentation, within the meaning of the Convention, of the property'. This is an overly restrictive provision. It ties the hands of the Minister, and, in the Bender's Quarry example, has resulted in unfair and unrealistic outcomes. Although the World Heritage Convention has some inadequacies, it does not obligate signatory parties to consider only conservation values to the exclusion of all else. It is submitted that a Minister should be required to take into consideration all the available information and consequences, including economic, social and cultural. If a full consideration is necessary, then, perhaps, it could be conducted by an independent arbitrator suitably qualified and experienced to make such a decision, or an independent inquiry.

Following the initial unilateral closure of Bender's Quarry on 20 August 1992, inquiries were made and reports given with regard to the rehabilitation of the quarry. An agreement was made between the Commonwealth and State Governments and Mr Bender on 30 September 1992 relating to the rehabilitation of the quarry.

Notwithstanding the above, the Commonwealth denied it had a legal obligation to pay compensation to Benders Pty Ltd.⁴³ It did, however, concede that it had a political obligation to make an ex gratia payment. This was clearly a major area of contention between the Commonwealth and State Governments and the Commonwealth and Benders Pty Ltd. As discussed above, limits were placed on the Bender's Pty Ltd quarry operation after the Cook/Groom Agreement, and claims for compensation were paid by the State Government and consented to by the Commonwealth Government. The compensation money was drawn from the World Heritage Area funds allocated to the State Government by the Commonwealth. One could argue that these payments set a precedent for future compensation payments to Bender's Pty Ltd to meet their legitimate claims.

The implementation of the World Heritage Convention in Australia is open to political exploitation as is evidenced by the unilateral closure of Bender's Quarry in South-West Tasmania. It is submitted that the decision to close the quarry without an acceptance of the obligation to the payment of full and fair compensation highlights a number of legal issues as set out below.

1. The status of the Cook-Groom Agreement dated 24 November 1988 specifically, and the status of Commonwealth and State contractual arrangements in general;
2. Section 51(xxxi) of the Constitution – compulsory acquisition of the Benders Pty Ltd lease;
3. The issue of natural justice;
4. The revocation of the Benders Pty Ltd mining lease under the Mining Act 1929 (Tas) and the payment of compensation. This matter relates to the owner's right

⁴³ Hon. Ros Kelly, Minister for the Environment, media release of 3 September 1992 set out in the appendix.

to compensation as against the State Government, and is not considered in this paper.

THE STATUS OF THE COOK/GROOM AGREEMENT DATED 24 NOVEMBER 1988 SPECIFICALLY, AND THE STATUS OF COMMONWEALTH AND STATE GOVERNMENT CONTRACTUAL ARRANGEMENTS IN GENERAL

INTRODUCTION

Clause 16 of the Cook/Groom Agreement dated 24 November 1988 has been referred to many times. *Prima facie* it appears unequivocal – 'should any financial loss result from any limits placed on the operation, the Commonwealth will pay compensation direct to the company concerned.'. The Cook/Groom Agreement was specifically endorsed ⁴⁴ by the Heads of Agreement dated 28 November 1988, and signed by the Rt. Hon. R J L Hawke, the Prime Minister, Senator Graham Richardson, the Minister for Environment, Senator Peter Cook, Minister for Resources, Robin Gray, Premier of Tasmania and Ray Groom, Minister for Forests. As noted earlier, Senator Cook assured Mr Bender, as late as August 1988, that the Commonwealth did not object to his continued mining of limestone. ⁴⁵

As noted above, Mr Bender's quarry operations continued under voluntary limits from August 1989 as a result of several studies and reports and he received compensation on account of these limitations totalling \$313,000 for the period August 1989 to August 1992. ⁴⁶ These payments were made by the State Government and endorsed by the Commonwealth Government. However, in correspondence from the Hon. Ros Kelly, Minister for Environment, to Mr Bender in late 1992, it was stated that on the advice of the Attorney-General there was no legal obligation on the Commonwealth to pay

⁴⁴ Clause 9.

⁴⁵ Letter from Senator Cook to Ray Bender, dated 18 August 1988, widely quoted in the media and referred to in 'An Appeal for Support', submission by Ray Bender dated 30 September 1992 at pages 1 and 7.

⁴⁶ 'An Appeal for Support', submission by Ray Bender dated September 1992 at page 6.

compensation under the 1988 Cook/Groom Agreement. However, the Commonwealth was willing to consider paying an ex gratia payment.⁴⁷

The legal question then arises as to whether the Cook/Groom Agreement, as endorsed by the Heads of Agreement, was intended to create legal relations or merely to represent non-justiciable political statements. Further, even if it was intended to create legal relations, the question must be asked as to how Mr Bender or others, as third parties, may seek redress or claim the benefits of such an agreement?

BACKGROUND

*Intergovernmental arrangements take a variety of forms. Some of the forms are traditional ones. Many arrangements require some legislative support. Others need parliamentary appropriation. Parliamentary involvement usually is avoided as far as possible, however: parliaments cannot always be guaranteed to produce the results on which governments have agreed. Many intergovernmental arrangements are manifested only in resolutions of ministerial conference, letters between Ministers or Heads of Government, or agreements. The practices followed in relation to agreements vary between schemes and between jurisdictions; some are schedules to legislation, some are approved by legislation, some are ratified or authorised by legislation and given the force of law. Some are required to be tabled, in some or all parliaments. Some are never brought before the parliaments at all.*⁴⁸

Intergovernmental arrangements have been a practice in Australian political history. One legal commentator has estimated there to be at least 325 such arrangements in Australia.⁴⁹ The Australian Constitution makes specific provision for intergovernmental arrangements. Firstly, section 51 (xxxvii) which provides for the State Governments to refer matters under their purview to the Commonwealth Government. The second relates to section 105A which provides for the making of agreements between the States and the Commonwealth with respect to state debts. Thirdly, section 96 provides the Commonwealth with the ability to provide financial assistance to the States on certain terms and conditions. Fourthly, sections 75, 76 and

⁴⁷ Various and wide-ranging media reports in late 1992 including Hon. Ros Kelly M.H.R., Minister for the Environment, media release 3 September 1992 set out in the appendix.

⁴⁸ Cheryl Saunders, Accountability and Access in Intergovernmental Affairs : A legal perspective, Papers on Federalism, Law School, University of Melbourne, January 1991, pages 6 and 7.

⁴⁹ K Wiltshire, Planning and Federalism: Australian and Canadian Experience, St Lucia, University of Queensland Press 1986, 140.

77 relate to the jurisdiction of both state and federal courts and the ability of the Commonwealth to invest in any court of a state, federal jurisdiction.

Notwithstanding that many of the intergovernmental relations relate to financial arrangements, many agreements relate to the 'sharing or rationalising of the use of legislative power and/or administrative action'.⁵⁰ The types of non-fiscal arrangements include (1) co-operation in legislation; (2) co-operative arrangements that may not be enforced by legislation; and (3) joint administrative bodies. Clearly, the Cook/Groom Agreement is an intergovernmental arrangement of a certain type. The Cook/Groom Agreement was an administrative and co-operative arrangement not enforced by legislation. Despite what may appear to be reasonably well defined parameters, the Australian system of government is not well suited for these arrangements:

*The lack of a conceptual framework for intergovernmental affairs manifests itself in various way. Because many co-operative arrangements involve an imaginative and unexpected use of constitutional power, their validity may be uncertain.*⁵¹

The constitutional and legal framework in Australia's federal system of government is not designed to provide a clear interpretation of the legal status of intergovernmental agreements. The agreements should be considered on an ad hoc basis, taking into account the general principles of a contractual relationship.⁵² There are recognised

⁵⁰ Cheryl Saunders, *Intergovernmental Agreements : Legal and Constitutional Framework*, Centre for Comparative Constitutional Studies, Papers on Federalism, No. 14, September 1989, page 9.

⁵¹ 'Almost all our rules of public law and political practice have been devised for a unitary system of government operating within a single jurisdiction. The fact of federalism does not necessarily detract from this proposition; the federal system was envisaged, by and large, as a series of individual governments independently exercising their allocated powers.' Cheryl Saunders, *Accountability and Access in Intergovernmental Affairs*, 1991, page 7.

⁵² Professor Saunders said this in her concluding remarks about the legal and constitutional framework of intergovernmental agreements.

From a constitutional and legal standpoint, intergovernmental relations is a major and intricate area of governmental activity. It affects almost all operations of government. It uses a wide and expanding variety of mechanisms. It owed at least some of its form and substance to the terms of the Constitution itself, and more recently, to judicial decision.' Cheryl Saunders, *Intergovernmental Agreements: Legal and Constitutional Framework*, 1989, page 20.

'In these circumstances, it is remarkable that relatively little attention has so far been paid to legal aspects of intergovernmental relations and their constitutional significance. One consequence has been the absence of both impetus and opportunity for the development of broad underlying principles about the structure and purpose of intergovernmental arrangements. In their absence, most decisions on such issues are ad hoc. This in turn has had some cost for the accountability and efficiency of Australian government.' *ibid.* page 20.

problems with the legal status of intergovernmental agreements and these same problems apply to the Cook/Groom Agreement:

The problems of judicial review of intergovernmental affairs are only now being recognised. ⁵³

On what basis can either the Federal or State Governments be held accountable for the decision made or agreements reached? The Constitution does not specifically provide for a review of such agreements.

The absence of a conceptual framework for intergovernmental affairs is most evident when they are considered by reference to accountability and access. ⁵⁴

Despite the problems of judicial review and the absence of a conceptual framework, if there is an intention to create legal relations, an agreement may be enforceable:

It is both possible and appropriate that where the terms of an agreement are sufficiently certain and the circumstances otherwise enable a court to conclude that the parties intended to enter into legal relations, an agreement is enforceable. ⁵⁵

The Cook/Groom Agreement was signed by a senior Minister from both the Commonwealth and State Governments. This Agreement was finalised following months of intense negotiations and a major forest inquiry. ⁵⁶ It was specifically endorsed in a Commonwealth/State Heads of Agreement, dated 28 November 1988, and was signed by the Prime Minister, two Commonwealth Ministers, the Tasmanian Premier and one senior State Minister. When these Agreements were released publicly, the signatories made it clear, in media statements, that they had intended to enter legal relations and expressed the hope the Agreement would resolve what would otherwise have been ongoing disputes. The Agreements were perceived not simply as political documents, but as legally binding Agreements. Quite simply, representations were made which people relied upon. Mr Bender relied on the representations made by both Governments and, in fact, compensation was paid for a limitation on the

⁵³ *ibid.*, page 21.

⁵⁴ *ibid.*, pages 10 and 11.

⁵⁵ *ibid.*, page 12.

⁵⁶ The Lemonthyme and Southern Forests Inquiry, established by the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 and chaired by Mr Justice Helsham.

operations of the quarry business. In Mr Bender's case, his business was closed without notice and he suffered substantial damages.

In considering the legal status of the Cook/Groom Agreement, one must review the document as a whole. Although Clause 16 is quite specific with respect to the payment of compensation, it should be considered in the context of the other provisions of the Agreement. Thus, the non-performance of Clause 16 is evidence of a breach of this purportedly legally binding document.

The other provisions refer to the financial and other obligations of the Commonwealth and State Governments, specifically with respect to the nomination of the world heritage area, and the payment of compensation to the forest industry and the State Government for forest industry development purposes. The obligations were met and the financial payments (from the Commonwealth Government) were made. The specific non-performance of clause 16 of the Agreement relating to the payment of compensation to the owner of Bender's quarry is evidence to support the case that there has been a breach of the Agreement.

The Intergovernmental Agreement on the Environment ('IGAE'), signed in February 1992 by all the States and the Commonwealth and a local government representative, stated the roles, functions and responsibilities of each sphere of government. The IGAE primarily included principles and guidelines and did not directly change or challenge the constitutional federal/state balance. Although the Cook/Groom Agreement was not written in the same way, i.e., with reference to principles and guidelines, it nevertheless had characteristics of an intergovernmental agreement. Gardner made the following comments about these agreements.

*The agenda for the development of intergovernmental agreements seems often to be determined more by the chaos of political inspiration and expediency than any carefully planned and logical schedule for creation of policy and law.*⁵⁷

The Cook/Groom Agreement referred to specific areas for World Heritage listing and specific amounts of money to be paid to specific people under certain circumstances. It

⁵⁷ Gardner, A, "Federal Intergovernmental Cooperation on Environmental Management", *Environment and Planning Law Journal*, vol. II (1994) at page 110.

was drafted in such a way that the terms and conditions were specific and designed to be legally binding.

But, under what circumstances may a third party challenge the provisions of the Agreement, take redress, or claim the benefits ensuing under the Agreement? With regard to these questions, Mr Bender had two immediate problems. The first was privity of contract ⁵⁸, a private law concept, and the second the issue of standing, a public law concept. What interest did Mr Bender have in the Agreement and what right did he have to see it implemented in accordance with its conditions? Further, it is fundamental that in building a case for Mr Bender, it should be remembered that the initial Agreement cannot in any way limit the legislative power of either government unless of course it has been legislated for, or the constitution has been amended accordingly.

Bankes says:-

... the High Court in particular has been extremely reluctant to accord legal status to intergovernmental agreements or to concede that they might have any effect on third parties. It has been similarly reluctant to conceive of the agreements themselves attaining any public law status or objective validity. ⁵⁹

The courts have been particularly cautious in allowing third parties to challenge intergovernmental agreements in the absence of a constitutional basis for the attack. 'Serious difficulties have been posed by traditional doctrine: the doctrines of privity and parliamentary sovereignty and the law of standing.' ⁶⁰

Bankes made these observations which emphasise the limited role of third parties in enforcing such an agreement as the Cook/Groom Agreement.

⁵⁸ Third parties cannot enforce a right or benefit under an agreement to which they are not a party.

⁵⁹ Nigel Bankes, Co-operative Federalism: Third Parties and Intergovernmental Arrangements in Canada and Australia, Papers on Federalism, No. 19, January 1991, page 35.

⁶⁰ *ibid.*, p. 58.

*As we have already indicated, these Australian cases do not deal directly with the issue of the effect of agreements on third parties but they are indicative of a general approach which suggests that the agreements are matters of private law of interest only to the parties or are only political arrangements. On either view third parties have only a limited role to play. If the agreements are merely political arrangements the public role is limited to the ballot box which provides a particularly hollow form of accountability where there may be two governments to hold responsible or to choose between. On the other hand the more the agreements are viewed as private law arrangements, the easier it is for the courts to deny the public a role in their implementation. The agreements themselves do not constitute law and it presumably follows that decisions made pursuant to such agreements are not statutory decisions amenable to judicial review.*⁶¹

Accordingly, there is a reluctance to accord legal status to agreements of this nature although the Agreement should be viewed in its 'nature', i.e. its terms and conditions, and also in the context of the surrounding circumstances, i.e., following an exhaustive inquiry and extensive negotiations. In addition to the above, Fowler has argued the merits of certain environmental dispute resolution ("EDR") techniques:

*There is a strong case for the use of EDR techniques such as environmental mediation alongside traditional court and tribunal processes in Australia.*⁶²

But this option requires all parties to enter into the process voluntarily and the surrendering of one's rights to an alternative dispute resolution process. Although the Cook/Groom Agreement may in fact have legal status, Mr Bender's ability to succeed in an action for a breach of contract appeared severely limited due to the difficulty with respect to his third party status and his lack of standing.

THE COMMONWEALTH REBUTTAL

As stated above, the Hon. Ros Kelly, Minister for Environment said the Commonwealth Government was not obliged to meet its legal obligations under the Cook/Groom Agreement because, inter alia, at the time the Agreement was endorsed, there was no information to indicate that quarrying activities at Bender's quarry were impacting adversely upon the Exit Cave system, nor was it foreseen that it

⁶¹ *ibid.*, p. 40.

⁶² Fowler, Robert, "Environmental Dispute Resolution Techniques", *Environmental and Planning Law Journal*, vol. 9 (1992), page 129.

would be necessary to curtail operations at the quarry to protect the World Heritage values.⁶³

The response to such an argument is, firstly, there was no information to indicate that quarrying activities at Bender's quarry were having an adverse impact upon the Exit Cave system at the time of the Agreement. Because if they were, no doubt the quarry would have been closed at that time and, presumably, compensation paid in the same manner as it was to those with forestry interests in the area pursuant to the same Agreement.

Secondly, although it was not foreseen that it would be necessary to curtail operations at the quarry, Clause 16 takes this into account very specifically. In addition to foreshadowing that limits may be necessary in the future, Clause 16 provides that compensation would be payable if any limits were placed on the quarry operation.

Thirdly, the reasons promoted by The Hon. Ros Kelly were directly rebutted by Senator Cook in his letter to Mr Bender of 18 August 1988.

Mrs Kelly's response appears to be somewhat in contradiction with her earlier statement⁶⁴ acknowledging that the Commonwealth Government had authorised the State Government's payment of compensation for limitations placed on the quarry operations. As stated above, a Deed of Release was signed by Mr Bender releasing the State and Commonwealth governments from any liability to pay further compensation with respect to the limitation imposed. At the date of Mrs Kelly's February 1992 letter, Mr Bender had received \$313,000 in compensation pursuant to the terms and conditions of the Cook/Groom Agreement.⁶⁵

In addition, pursuant to Clause 8 of the Heads of Agreement, the Commonwealth agreed to provide \$50 million for the forest industry, over a 5 year period, on account of the resource lost through World Heritage listing. This is evidence that compensation was paid and would be paid for limitations placed on the productive activities in these world heritage areas.

⁶³ Widely reported in Tasmanian daily newspapers from mid to late 1992 and early 1993 and in correspondence to various Tasmanian groups and people but also see Hon. Ros Kelly M.H.R., Minister for the Environment, medial release 3 September 1992.

⁶⁴ Letter from the Hon. Ros Kelly to Mr Bender, dated 28 February 1992, referred to in 'An Appeal for Support', submission by Ray Bender dated September 1992.

⁶⁵ 'An Appeal for Support', submission by Ray Bender dated September 1992 at page 6.

The provisions of the Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987 provide further insight into the inadequacy of the existing compensation provisions of the World Heritage Properties Conservation Act 1983 and strengthen the, perhaps, inadequate argument of Mr Bender's claim for compensation pursuant to the Cook/Groom Agreement.

Section 19(1) of the Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987 provides:

Where (a) a person refrains from doing an act, being an act of a kind made unlawful by section 16(1), by reason only that:

(i) the act is made unlawful by that subsection; or

(ii) an injunction or interim injunction is granted under section 17 restraining the person from doing the act; and

(b) because the person refrains from doing the act, the person suffers loss or damage, the Commonwealth is liable to pay compensation to the person in respect of the loss or damage.

'To carry out an excavation works within the protected area' was activity made unlawful by section 16(1). Accordingly, if the inquiry was still proceeding at the time Bender's quarry was closed by the Federal Minister for the Environment in 1992, compensation would be paid pursuant to section 19 for the loss and damage to his business by the limits placed on his quarry – to the extent of the prohibition. How is it possible for compensation to be payable and entirely appropriate during an inquiry before the area is listed for world heritage, but not after the inquiry, when agreement has been reached for the activity to continue, and the area has been World Heritage listed?

The contrast in the compensation provisions of the Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987 and the World Heritage Properties Conservation Act 1983 is stark. The latter requires an acquisition of property whereas the former requires only 'loss or damage' resulting from a prescribed activity and the compensation extends to those indirectly affected, ie : transport operators. ⁶⁶

⁶⁶ See Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987 Section 19(2).

The Cook/Groom Agreement acknowledged the compensation provisions of the Lemonthyme and Southern Forest (Commission of Inquiry) Act 1987 and attempted to implement them in the form of clauses 16 and 17. Compensation was payable for limitations on the operations of the quarry not simply its 'acquisition'. In fact, acquisition is not even referred to in the Agreement.

CONCLUSION

The Cook/Groom Agreement poses many complex problems for Mr Bender and, in particular, privity of contract and standing. With regard to the Agreement itself, the problems include the sovereignty of Parliament and the fettering of the discretion of the Executive. The Cook/Groom Agreement by its nature is merely a co-operative agreement and not one which has received legislative or constitutional backing.

Despite the signatories to both the Heads of Agreement and the Cook/Groom Agreement expressing an intention to enter legal relations, Mr Bender's case for attaining compensation appears limited. Mr Bender, as a third party, cannot enforce the Agreement between the State and Federal Governments and lacks standing to issue legal proceedings for compensation.

With regard to improving the current legal and political framework with respect to intergovernmental agreements, Saunders had this to say :-

*The principal argument in this paper is that intergovernmental affairs limit the effectiveness of all the usual mechanisms for enforcing the accountability of government and ensuring access to information about its operations.*⁶⁷

Mr Bender was not able to rely on the terms and conditions of the State and Federal intergovernmental agreement. Neither the State or Federal Government was accountable to Mr Bender for its actions in breaching the Agreement (Clause 16

⁶⁷ Cheryl Saunders.

'Some of the difficulties could readily be overcome. Ministers could report regularly to their parliaments on the activities of ministerial councils; resolutions of ministerial councils could be made publicly available; intergovernmental agencies could table reports in the parliaments of all participating jurisdictions; parliaments at both levels could involve themselves more actively in the terms and conditions of intergovernmental fiscal transfers ... Yet their collective effect is to place intergovernmental affairs in a position where they are sheltered from accountability and access to a much greater extent than any other activities of government. It is a situation which is difficult to accept at a time of increasing support for open, effective and accountable government. It is a factor that should be taken into account whenever the desirability and extent of intergovernmental action on a particular issue is under consideration.' Accountability and Access in Intergovernmental Affairs, pp. 27, 28 and 29.

specifically). It is submitted that one approach would be for intergovernmental agreements to be tabled in the Parliament of each jurisdiction and if they were not disapproved within a certain time, say 10 sitting days, then they would become law. In this way Governments as parties to intergovernmental agreements would become accountable for their actions.

In a joint article, three commentators said:

*While the Agreement negotiated between the Commonwealth and Tasmania is not legally binding on either Government, it is clear that it would be politically damaging for either to renege on it, at least in the near future.*⁶⁸

Such a statement highlights the earlier assessment as to Mr Bender's lack of probable success and lends weight to the opinion that governments in signing these agreements remain accountable only to the electorate at the polling booth every few years. Such an approach is unsatisfactory when the community is calling for a more open and accountable government between elections.

As stated above, the legal and constitutional framework in which such agreements are made is far from sophisticated. Australia's federal system of government is currently ill-equipped and unprepared to deal fairly with the consequences of such agreements. The blatant and categoric breach of such agreements is not acceptable in a democracy like Australia. The most productive, and probably least costly, recourse for Mr Bender was via political means through influencing results at the ballot box. Alerting the public to the blatant and categoric breach of Clause 16 of the Cook/Groom Agreement and highlighting the resulting injustice was a costly but nevertheless necessary alternative approach.

⁶⁸ Dr B Martin Tsamenyi, J Bedding and L Wall, Determining the World Heritage values of the Lemonthyme and Southern Forests : Lessons from the Helsham Inquiry, *Environmental and Planning Law Journal*, June 1989, p 79 at p 90.

SECTION 51(XXXI) OF THE CONSTITUTION – COMPULSORY ACQUISITION OF BENDER'S PTY LTD LEASE

INTRODUCTION

Section 17(2) of the World Heritage Properties Conservation Act 1983 provides, 'Where the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition'.

The Commonwealth Government denied that there was an acquisition of property.

I have been advised by the Attorney-General that, whilst there may be no legal imperative on the part of the Commonwealth to pay compensation to Bender Pty Ltd...' ⁶⁹

The Commonwealth Government stated that the proclamation, dated 3 August 1992, and the regulations (amended by Statutory Rule No. 262 of 1992 and gazetted on 15 September 1992) did not constitute an acquisition of property. Accordingly, the Commonwealth's view was that section 17(2) of the Act was not applicable to the current facts.

It is submitted that the proclamation was or the regulations were not merely a prohibition of certain activities, they effectively prohibited the operation of a quarrying business that had been in existence for over 40 years. Even if the Commonwealth Government view was legally correct with respect to the initial closure of the quarry on 20 August 1992, it could not be sustained with respect to the second closure on 30 October 1992 which occurred after protracted discussions and when all quarrying operations ceased.

BACKGROUND TO THE COMPULSORY ACQUISITION OF PROPERTY

Five formal steps are commonly followed when a government undertakes a compulsory acquisition of property ⁷⁰:

1. issue of notice of intention to acquire;

⁶⁹ Letter from the Hon. Ros Kelly, Minister for Arts, Sport the Environment, Tourism and Territories to the Hon. Ralph Willis, Minister for Finance, dated June 1992 set out in the appendix.

⁷⁰ Brown, Acquisition of Land in Australia, 3rd Edition (1990), p. 59.

2. issue of notice to acquire (resumption);
3. making of claim for compensation by landowner;
4. assessment and payment of claim by the government authority; and
5. vacation of land by the landowner.

The owner (and sometimes those with an interest in the property) is or are usually entitled to object to both the notice of intent to acquire and the notice to acquire.⁷¹

The governing authority may offer the owner alternative property in exchange for the property it intends to acquire; however, this is only possible with the consent of the owner.

What proprietary rights does Mr Bender hold if his ability to possess or dispose of the quarry lease, let alone work and use the quarry, are taken from him. A fair definition of ownership must surely embrace the right of possession, the right to sell and the right to use. Mr Bender, to achieve possession and the right to work the quarry, has expended substantial resources and it is submitted he should receive recompense for the loss of such resources. If Mr Bender does have a right to compensation, in what form could it be made?

Compensation should include 'any loss, injury or damage suffered as a direct, natural and reasonable consequence of the acquisition'.⁷² This may include the following:

1. the market value of the business (including goodwill)
2. severance damage (for the land)
3. disturbance damage
4. legal and valuation expenses
5. special damages, eg: injurious affection or solatium.

With regard to solatium, Mr Bender may be entitled to additional compensation relating to hardship, inconvenience, injured feelings, injured reputation and insults due

⁷¹ Land Acquisition Act 1955 (Commonwealth).

⁷² Brown, *Acquisition of Land in Australia*, 3rd Edition (1990), p. 93.

to media exposure of the compulsory acquisition. 'It is a kind of sweetness reflecting some kind of apology'.⁷³

*They include factors personal to the claimant, for example, the length of time he has been in occupation and his age. Where it is not defined by statute, it has been held to refer to subjective and imponderable factors such as nuisance, annoyance, inconvenience and distress, which might be caused to an owner who, as a result of the compulsory acquisition, finds himself under the necessity of relocating, Robertson v Commission for Main Roads (1987) 63 LGRA 420. It is awarded for the considerable disruption and inconvenience that is not readily able to be otherwise compensated, Waalt Homes Pty Ltd v Road Construction Authority (1986) 64 LGRA 346. It does not seek to compensate an owner for his own financial problems unless they were increased by the resumption.*⁷⁴

The situation in Mr Bender's case, it is submitted, would fall into this category. Mr Bender was integrally linked with Benders Pty Ltd, the lessee of the mining lease. According to Brown, expectation of a renewal of the lease may or may not be taken into account.⁷⁵ Under the Mining Act 1929 (Tas), Mr Bender could reasonably have expected his lease would be renewed in the year 2003. For the purposes of assessing the exact amount of compensation payable, it is traditional practice that a commercial interest rate apply as from the date of acquisition.

ARGUMENTS FOR AND AGAINST COMPULSORY ACQUISITION

The Commonwealth Government denied that there was an acquisition of property, relying on Mason J and Brennan J's judgments in the Franklin Dam High Court case. Mason J said in his views with respect to section 51(xxxi). 'But the extinction or limitation of property rights does not amount to acquisition ... Unless the Commonwealth gains some property from the State or person, there is no acquisition within the paragraph.'⁷⁶

Brennan J said:

⁷³ *ibid.*, page 134.

⁷⁴ *ibid.*, page 134.

⁷⁵ *ibid.*, page 134.

⁷⁶ (1983) 46 ALR 625 at page 738.

In the United States, where the Fifth Amendment directed that private property should not be 'taken' without just compensation, the Supreme Court construed that the provision as one 'designed' to bar the Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole ... If this court were to construe section 51 (xxxi) so that its limitation applies to laws which regulate or restrict the use and enjoyment of proprietary rights but which do not provide for the acquisition of such rights, it would be necessary to identify a touchstone for applying the limitation to some regulatory laws and not to others.

In my opinion, the Commonwealth acquired no property from Tasmania.
⁷⁷

Brennan J, it appears, was attempting to state that if the government action was for the benefit of the public as a whole then the person bearing that burden should not bear it alone. Although Brennan J construed the facts in the Franklin Dam case to say there was no requisition of land, in Mr Bender's case, it may well have been different. Should the action of the Commonwealth Government in closing Bender's quarry be viewed as in the public interest. Although this was allegedly the position of the Commonwealth Government, the quarry owner carried the burden of this government action. The action did not merely regulate or limit the operations of the business. The business was made unviable and worthless.

Mason J also found there was no acquisition of property in the Franklin Dam case. However, one of the 4 majority judges, Deane J, held there had been acquisition of property. Deane J stated:-

Difficult questions can arise when one passes from the area of mere prohibition or regulation into the area where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation. ⁷⁸

Deane J used a helpful analogy to indicate his views:-

⁷⁷ (1983) 46 ALR 625 at page 795.

⁷⁸ (1983) 158 CLR at page 283.

*Thus if the Parliament were to make a law prohibiting any presence upon land within a radius of one kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land in its unoccupied state notwithstanding that the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.*⁷⁹

Deane J held that:

*The 'property' purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the 'application of the property in or towards carrying out' Australia's obligations under the Convention. The Compensation which would represent 'just terms' for that acquisition of property would be the difference between the value of the HEC land without and with the restrictions.*⁸⁰

If such an analogy were applied to the facts in the closure of Bender's Quarry, or could clearly be shown, the benefit (or perceived benefit) of the action would have flowed to the Commonwealth Government. The mining lease may well remain in existence (despite the obligations existing under the lease to continue operations) but the benefit of the prohibitions on operations would flow to the Commonwealth Government. Deane J's view that the rights to compensation would be assessed by comparing the value of the owner's proprietary rights before and after the Commonwealth Government action (prohibition) may well be supported today because the minority Judge, Gibbs CJ Wilson and Dawson JJ did not express a view on the application of section 51 (xxxix) and therefore Deane J's view combined with the minority may see a decision in favour of Mr Bender in this instance. This hypothesis has received some support from one commentator :

*Deane J was the only justice to find that the Commonwealth's legislative activity in this case was an acquisition of property requiring just compensation. There is every reason to think that the minority justices would support this view as in the past the court has taken a very broad view of the nature of 'property' within section 51 (xxxix) and also a wide view of what constitutes an 'acquisition' of such property. This remains the major area of uncertainty arising from the decision.*⁸¹

⁷⁹ *ibid.*, page 283.

⁸⁰ *ibid.*, page 283.

⁸¹ John Goldring, 'Initial Reactions to the Dams Case: Dam or Floodgates?', *Legal Services Bulletin*, August 1983, page 158.

Deane J also found the provisions of section 17 of the Act intrinsically unfair due, inter alia, to the lengthy time delays imposed on any claimant.⁸²

An interesting analogy can be drawn to a mining operation that was forced to close by Commonwealth Government action. In a Writ of Summons and Statement of Claim filed in the Federal Court of Australia (Sydney) on 24 November 1992, Newcrest Mining (WA) Ltd claimed that it was entitled to all of the legal right, title and interest under certain mining leases and pursuant to sections 7 and 10 of the National Parks and Wildlife Conservation Act 1975, the Commonwealth Government 'purported to effect the acquisition of Newcrest Mining Ltd's property. The Statement of Claim provides:-

the purported acquisitions ... were not made on just terms ... are beyond the power of the Commonwealth Parliament ... and ... were invalid and of no effect, by reason of both section 51 (xxxi) of the Constitution and sub-section 50(2) of the Northern Territory (Self Government) Act 1978.

This writ of summons was issued pursuant to section 51 (xxxi), inter alia, and is based on similar grounds to those in the Bender's quarry matter because Benders Pty Ltd was also prohibited from exercising its rights pursuant to the mining lease. The Newcrest Mining (WA) Ltd Statement of Claim also provided, 'Since the time of the proclamations ... the Director of National Parks and Wildlife has sought to exclude the company, its servants and agents from the land over which the Mining Leases existed and has prevented the company, its servants and agents from exercising its right under the Mining Lease'.

This Federal Court matter relates to the extension of the Kakadu National Park and was highly controversial and political. It will become a major test case for those mining, forestry and pastoral entities that have an interest of some sort in a national park, state reserve or conservation area, etc. Conversely, it is directly relevant to Commonwealth and State Governments that may consider dedicating new areas for conservation purposes. In essence, the Federal Court will be asked to decide if compulsory acquisition has occurred on just terms, and with regard to the latter point, what are just terms, namely, what amount of compensation would be payable. These issues are directly relevant to the Bender's quarry dispute.

⁸² (1983) 46 ALR 625 at page 832.

Mr Bender's right to possess, use or sell his proprietary rights under the mining lease have been extinguished. In addition, the Commonwealth has acted pursuant to the World Heritage Properties Conservation Act 1983 for the benefit of the public. The Commonwealth is obtaining a benefit of the land, not in spite of its unoccupied state, but because of its unoccupied state. The Commonwealth, in meeting its obligations (or at least perceived obligations) pursuant to the World Heritage Convention, has derived a considerable and perhaps immeasurable benefit as a result of the extinguishment of Mr Bender's proprietary rights.

The Commonwealth in closing Bender's quarry was clearly exercising its rights under the World Heritage Convention pursuant to the World Heritage Properties Conservation Act 1983 and section 13(1) in particular. The copy of the Explanatory Memorandum of the proclamation made under section 6(3), set out in the appendix to this chapter, summarises the rights and obligations of the Commonwealth Government. Did the Commonwealth merely exercise its rights and responsibilities to prohibit certain activities or did it exercise such rights and responsibilities to the point of extinguishing Mr Bender's proprietary rights and furthermore obtain a benefit for itself and for the public in general? It is submitted that the latter is more sustainable.

THE ISSUE OF NATURAL JUSTICE

A property and business owner's rights to natural justice, it is submitted, have been denied by the Commonwealth Minister's decision to unilaterally close Bender's quarry.

On 20 August 1992 Mr Bender's quarry business was closed unilaterally by the Federal Minister for the Environment, the Hon. Ros Kelly, without notice. Mr Bender's business has been valued at between \$3 to \$5 million.⁸³ The Commonwealth Government denied any legal liability to compensate Mr Bender for the loss of his business.

The question arose, *inter alia*, was the Minister's action a denial of natural justice. It is acknowledged that in a democracy the rules, practice and procedure are developed to ensure fairness and natural justice particularly as those rules affect people and their

⁸³ Tasmanian Government, *Economic Implications of the Closure of Bender's Quarry*, 27 November 1990.

proprietary rights.⁸⁴ The individual whose proprietary rights may be adversely affected, is entitled to a hearing before a decision is made that will affect those rights.

*... rules excluding natural justice should be declared invalid when the domestic body concerned has the power to affect the right to work, to carry on a business or enjoy some other valuable advantage.*⁸⁵

In the instant case, Mr Bender's rights were taken away on 20th August 1992. In addition, following the second and final closure of the quarry on 30th October 1992, the right to work was removed together with the right to carry on the business. The Commonwealth Government denied any legal liability to pay compensation and, accordingly, Mr Bender was unable to enjoy some other valuable advantages. Both closure decisions were made without notice. Natural justice requires not only fair and reasonable notice but details of the procedure to be followed subsequent to the notice being given. The notice given should give the party concerned an opportunity to make representations and to prepare and present their, or its, case. Often, in administrative proceedings, notice is given of the time and place for hearing the legal and factual issues which may be involved or discussed.⁸⁶ There may also be a duty to give reasons for the decision.⁸⁷ The party concerned should also be assured a hearing before an impartial decision-maker.⁸⁸

Natural justice was at the centre of a legal battle between the Commonwealth Government and a large Australian mining company, Peko-Wallsend Ltd only a few years ago.⁸⁹ Peko-Wallsend Ltd held various exploration permits and mining leases for interests in respect of approximately 30 small areas which together made up about 1% of the total area of Kakadu Stage 2, National Park in the Northern Territory. On 16 September 1986, the Commonwealth Government decided to submit to the World Heritage Committee, under Article 11 of the Convention, a site having an area of 6,929 square kilometres, which included the mining interests aforementioned. Peko-Wallsend Ltd was fearful of the consequences of the listing of the property as World Heritage and that in time their interests may be expended pursuant to the World

⁸⁴ H Whitmore and M Aronson, *Review of Administrative Action*, the Law Book Co (1978), page 42.

⁸⁵ *ibid.*, page 75.

⁸⁶ Geoffrey Flick, 'Natural Justice: principles and practical applications', Butterworths 1979.

⁸⁷ *ibid.*, pp. 86 to 111.

⁸⁸ *ibid.*, pp. 112 to 114.

⁸⁹ Minister for Arts and Heritage (Cohen) v Peko-Wallsend Ltd and Ors (1986) 70 ALR 523 and (1987) 75 ALR 210.

Heritage Properties Conservation Act 1983. They argued that the rules of natural justice or procedural fairness applied and that they should have been given an adequate opportunity to be heard by the Cabinet before a decision to nominate was made.⁹⁰

The Minister for Arts, Heritage and the Environment, the Hon. Barry Cohen, and Minister for Foreign Affairs, Senator Gareth Evans, on 16 September 1986, issued a joint media statement, as follows :—

The Government agreed today to endorse a revised plan of management for the Kakadu National Park which would exclude the possibility of any new mining activity taking place within the park boundaries.

*The Government has agreed that immediate steps should be taken to nominate Stage 2 of the Park for inclusion on the World Heritage List. Stage 1, covering 6,144 square kilometres, was declared in 1979 and listed as a World Heritage site in 1981; Stage 2, covering 6,929 square kilometres, was declared part of the Kakadu National Park in 1984.*⁹¹

Peko-Wallsend Ltd were granted an interlocutory injunction on 24 November 1986, and Beaumont J handed down his written judgment on 22 December 1986. (Federal Court of Australia, General Division.) With regard to the rules of natural justice or procedural fairness, extracts from Beaumont J's judgment follow:

There is no doubt that, in the absence of a clearly expressed legislative intention, no-one can be dismissed from office, penalised, or deprived of or prejudiced in relation to his property without being afforded an adequate opportunity to be heard. (page 544)

*Although the applicant could not reasonably insist upon any opportunity to address the Cabinet body, they were given no opportunity to put appropriate material before that meeting of the Executive which might then persuade it of the wisdom of other possible approaches to the matter ... Another possibility would be that the applicants would seek from the Government compensation for the financial loss they would probably suffer if listing were to be granted ... Moreover, the applicants might well wish to put before Cabinet a current valuation of the mining interests or rights.*⁹²

⁹⁰ Bedding, J M, "Private Interests in World Heritage Properties: Peko Wallsend Ltd v Commonwealth" (1989), 9 *Tasmanian University Law Review*, page 316.

⁹¹ Cohen and Evans, Federal Government joint media release, 16 September 1986.

⁹² *op. cit.* page 551 In addition 'Of course, the presumption may be displaced by the text of the statute, the nature of the power and the administrative framework created by the statute within which the power is to be exercised.' (page 545)

'It is true that the obligations under the Convention are expressed, in Article 6, to be 'without prejudice to property rights provided by national legislation'. But, as Mason J observed in the Franklin Dam case (at page 698), this provision, no doubt because it has no municipal operation, 'provides some safeguard for such

Beaumont J's judgment declared the decision of the Cabinet to nominate Stage 2 of the Kakadu National Park for inclusion on the World Heritage list as void. Although the Minister for Arts, Environment and Territories appealed to the full court against Beaumont J's decision, the Commonwealth Government subsequently asked the World Heritage Committee to defer until its 1987 meeting (ie: for one year) the application in respect of Kakadu Stage 2.

In addition, the Beaumont J decision influenced the Commonwealth Government's decision to hold an Inquiry into Tasmania's Lemonhyme and Southern Forests.

*The decision to hold the inquiry was influenced by legal and political considerations. The Commonwealth believed that it was obliged, on the basis of Beaumont J's ruling in Peko Wallsend Ltd v Minister for the Arts, Heritage and Environment (1986), to hold an inquiry to afford natural justice to all interested parties who might be affected by any world heritage nomination of the forests.*⁹³

The appeal by the Minister for the Arts, Heritage and Environment to the full court of the Federal Court of Australia subsequently overturned the decision of Beaumont J. All the appeal judges found that the decision to nominate was made under the prerogative and although such decisions may, in some circumstances, be open to judicial review, it was not in this case.

Although the Beaumont J decision was subsequently overturned, the Commonwealth introduced the Lemonhyme and Southern Forests (Commission of Inquiry) Act in 1987. The very fact that the Commonwealth initiated legislation to hold an exhaustive inquiry affording all those with an interest in the land an opportunity to make representations is evidence to support the argument that a hearing is warranted before any person's interest in property is prejudicially affected.

Sheppard J's following statement summarises the position of the other two judges:

*This case is not based on the exercise by Cabinet of any statutory power. The power here was an exercise of prerogative power.*⁹⁴

existing and future rights in property forming part of the World Heritage as a nation state may choose to protect, acknowledge or create'. (page 546)

⁹³ Benjamin J. Richmond, A Study of Australian Practice Pursuant to the World Heritage Convention, Environmental Policy and Law 20/4-5/1990, page 143 at 148.

⁹⁴ (1987) 75 ALR 210 at page 226.

*In most circumstances, I think that one should accept the submission of Counsel for the appellants that the respondents had an adequate opportunity of putting their case to the relevant Ministers and officials, that the purport of that case was before Cabinet and that nothing that the respondents could have said would have added at all to the case. In other words, in the circumstances which prevailed, they were given a fair opportunity of being heard and they took advantage of it. It is on this ground that I think the appeal should be allowed.*⁹⁵

The full court held that, inter alia, it would be inappropriate for the court to intervene to set aside a Cabinet decision involving such complex policy considerations even if the respondents were thought to have been inadequately considered.⁹⁶ The closure of Bender's Quarry was not a Cabinet decision but one requiring Ministerial action pursuant to the World Heritage Act.

Although the Minister, the Hon. Ros Kelly, informed Mr Bender that, pursuant to section 13(1) of the Act, the Minister shall have regard only to the protection, conservation and preservation of the World Heritage values, the decision was made by the Governor-General in Council by proclamation and regulations and this process should have been attended with a duty to be fair, eg: a hearing with Mr Bender and, perhaps, others affected, including the workmen, transport operators and the local community should have been available.⁹⁷

⁹⁵ *ibid.*, page 228. Also see the following :

The only decision was the decision of Cabinet. The matter did not come before the Executive, that is the Governor-General in Council. (page 222)

'In my opinion, subject to the exclusion on non-justifiable matters, the courts of this country should not accept responsibility for reviewing the decision of ministers or the Governor-General in Council notwithstanding the decision is carried out pursuant to the power derived not from statutes but from common law or the prerogative.' (page 224)

'Indeed, there was no statutory provision at all relating to the nomination by Australia of properties for inclusion upon the World Heritage list. The World Heritage Properties Conservation Act does not deal with this matter. In so far as its operation depends upon properties being listed, that Act assumes that the property has been, or will be, listed dehors the Act. And, of course, as a matter of history, several Australian properties were nominated, and listed, before the enactment of this legislation ...' (page 244)

'Having a regard to these matters, it is clear that the decision made by Cabinet was disadvantageous to Peko-EZ. Just how disadvantageous is difficult to say.' (page 250)

'The decision of Cabinet to seek World Heritage listing of Stage 2 will have domestic legal significance only if it results in a proclamation under the World Heritage Properties Conservation Act or if it affects the terms of subsequent plans of management.' (page 251.)

⁹⁶ *ibid.*, Bowen CJ, page 11.

⁹⁷ *ibid.*, note, Wilcox J. :

'In many cases where decisions are committed to the Governor in Council, there could be no question of that decision-making process being attended with a duty to be fair and so to allow individual representations from persons affected by the decision to be incorporated into the process. The problem does not arise where decisions are of a legislative character or of a kind which affected the community as a whole or large sections of it. Again, if it were the fact that a decision affecting an individual is dictated by

This Peko-Wallsend case seemingly provides a strong argument that legal challenges seeking judicial review of the decision to nominate a property for listing are unlikely to succeed, but casts a shadow on the likelihood of the success of legal challenges seeking judicial review of a decision by the Minister authorised by the Governor-General in Council (pursuant to a proclamation and subsequent gazettal) to regulate and limit certain actions to the point of prohibiting and extinguishing proprietary rights.

An authoritative source on the rules of natural justice had this to say about the Minister's discretion not to allow a hearing:—

If there is an application of a pre-determined policy to the exercise of discretion in such a way that it fails to consider the merits of a particular case – then the decision may be invalidated. ⁹⁸

In Mr Bender's case, a very substantial business of significant monetary value was lost.

Mr Bender acquired a mining lease pursuant to the Mining Act 1929 (Tas) and a licence to operate under the Environment Protection Act 1973 (Tas). The Commonwealth Government effectively abolished Mr Bender's interest in this lease and licence. Even a taxi licence revocation has required application of the rules of natural justice:—

It seems clear enough that the highest standards of natural justice should be attracted by the power to revoke a licence; since the revocation may involve loss of livelihood or loss of assets, or, indeed, the failure of a business enterprise, the licensee should know the case he has to answer and be given every opportunity to meet that case. ⁹⁹

In the instant case, the Commonwealth Minister is both judge and prosecutor. It would seem logical that Mr Bender should be entitled to respond to the reports commissioned by the Commonwealth Minister or relied on by the Minister to make the decision. He should also be entitled to advise the Minister on the likely effect of her decision on his business, the workmen, his proprietary rights and the rights of others. This never occurred.

the application of a principle of government policy, with a result that considerations personal to the individual do not and could not influence the outcome, then there is no applicable principle of fairness which requires more than the individual in question being informed of that overriding policy consideration.' page 252 – 253.

⁹⁸ Geoffrey Flick, Natural Justice; principles and practical applications, Butterworths, 1979, page 132.

⁹⁹ H Whitmore and M Aronson, Review of Administrative Action, the Law Book Co (1978), page 78.

In addition to the above, it was wholly reasonable for Mr Bender to expect to be compensated for any restriction or limitation that was placed on his business or quarrying operations – as had occurred in the past. These limitations and restrictions, although imposed on Mr Bender, were discussed with him and he was provided with a brief opportunity to respond. Furthermore, the compensation paid was drawn from Tasmania's World Heritage Funds and made with the full knowledge and consent of the Commonwealth Minister for the Environment. Until February 1992, Mr Bender had received \$313,000 in compensation for limitations and restrictions on his business and quarrying operations in accordance with Clause 16 of the Cook/Groom Agreement of 24 November 1988, as discussed previously. Such precedents created, fairly and reasonably in the mind of Mr Bender, an expectation of a similar process that would continue well into the future. In fact, Mr Bender was requested to sign a Deed of Release in regard to each payment of compensation.

The purport of any such Deed of Release is that with respect to costs incurred or losses suffered, and with respect to claims, etc, in the past, the parties to the Deed give up any future right to claim. Mr Bender could have expected that if those or similar claims could be pursued in the future, the usual negotiating procedure would ensue. The abrupt and unilateral decision to prohibit quarrying operations was made without notice to Mr Bender. The Commonwealth Minister denied legal liability to pay compensation and made no account of, or approach to, Mr Bender with regard to his ability to, firstly, terminate the employment of his workmen, one of whom had been at the quarry for over 40 years, or, secondly, meet his ongoing costs under the lease. The redundancy costs amounted to in excess of \$50,000 and were clearly not included in Mr Bender's expense budget for that year.¹⁰⁰ In addition, the payment of lease rental to the State Government as required pursuant to his mining lease, and the other obligations arising under the mining lease, including obligations to rehabilitate the quarry and make it safe, were assumed immediately to be a cost and obligation that would be met by Mr Bender. The onus was on Mr Bender to show that such costs and obligations should not have to be paid or met by him at that time.

The Commonwealth Minister left unanswered and unresolved the above matters and other concerns. The Minister disregarded Mr Bender's rights to argue or negotiate in any way to the degree of severely prejudicing his proprietary rights.

¹⁰⁰ Mercury article, 'Bender on Warpath', 2 September 1992.

CONCLUSION

The legislative and administrative frameworks for world heritage management in Australia are inconsistent and inadequate for dealing with the rigours and pressures imposed by competing interests. The existing management procedures facilitate the ad hoc politically inspired decision making that was evidenced in the Bender's Quarry dispute. The joint management arrangements operate satisfactorily when funding is sufficient to adequately fulfill the operation and management of these areas, and, further, management arrangements operate satisfactorily when there are management concerns requiring a little more than co-operative discussions between federal and state government representatives. If there is any dispute at all between the two governments, then the satisfactory management of Australia's world heritage areas are called into doubt.

The example provided in the closure of Bender's Quarry in south-west Tasmania demonstrates the pitfalls facing both the Federal and State Governments in their management of these areas. Clearly, the legal status of intergovernmental agreements made both in the past and the future are questionable at best. These agreements have proved to be little more than political documents that can be discussed and debated again prior to an election. It is likely that the High Court may give greater emphasis to the proprietary rights of individuals who are adversely affected by the management decisions made by government in these areas. The court's view of the Federal Government's prohibition of certain activities in these areas may very well be such as to grant compensation for an acquisition of property pursuant to section 51 (xxxix) of the Constitution. The Federal Government's past ad hoc decision-making, no matter how soundly based, may well have been the cause of the denial of natural justice to Mr Bender. To close a major business operation without notice, and without an opportunity for the other party to be heard, shows a denial of natural justice.

Chapter 9

CONCLUSION

World Heritage is something in which all Australians should be deservedly proud. However, Australia's nomination, listing and management procedures are deficient and in need of major reform. It is inappropriate to continually blame the 'politically hostile State Governments' (of both political persuasions) for the world heritage concerns of the past and today.

Decisions about world heritage nomination, listing and management are made for primarily politically inspired reasons where an objective analysis of all the information available through a transparent process is avoided. The public at large and competing interests in particular, including state and local governments, community groups, forestry and mining companies, and rural and recreational interests, are disenfranchised from the decision-making process with respect to world heritage. In many instances the early notification of possible world heritage nominations has been avoided. The support of the local communities should be obtained prior to nomination and listing. The successful management of these world heritage areas requires the local community to "own" the assessment and nomination process. The fact that the conservation value of the subject area is the only consideration reviewed by the Federal Government in any decision-making obviously causes division. A fair and objective assessment of all the values of the area should be made before arriving at a decision. For example, socio-economic impact studies should be conducted prior to nomination as part of the assessment process.

In addition, evidence of the inadequate processes is shown by the lack of effective and agreed management plans being finalised prior to listing. It is necessary that these management plans receive local support and are adequately funded prior to listing. Disputes with respect to funding these areas put at risk the world heritage values the Government purportedly aims to protect and conserve.

The debate involving world heritage matters in the past two decades or so has transferred the balance of power between the Federal, State and Territory governments in favour of the Federal Government. Specifically the responsibility for land use planning and the management of this country's natural resources is no longer the sole responsibility of the States and Territories. The debate has led to a polarisation of views between political parties and between the different spheres of government.

Quite simply the important issues emanating from the nomination, listing and management of world heritage should be viewed in a political context not purely a legal or administrative context.

Being a signatory to the world's most popular treaty on conservation has caused uncertainty in Australia as a federation of states where the states have traditionally been responsible for land use management and planning. That is now changing rapidly and consistently with the signing by the Federal Government of more than 2,000 international treaties pursuant to section 51 (xxix) of our Constitution. Australia is in need of a rigorous and comprehensive review of its treaty making procedures to, inter alia, enable more community involvement and consideration of the international treaty and the consequences it may bring, prior to its signing. In addition, consideration is necessary of the process by which the Federal Government responds to the decisions of the myriad of committees established under these international treaties.

The relinquishing by Australia of its sovereignty with respect to delisting areas of world heritage status is but one concern that can be highlighted in reviewing our right to determine our own future.

The increasing calls for a review or 'audit' of the responsibilities, roles and functions of both the Federal and State Governments is a response to the substantial shift in powers to the Federal Government in the past decade. The nomination, listing and management procedures for world heritage areas is a prime example to demonstrate this shift. The audit would be timely as we approach the centenary of federation in 2001.

The world heritage nomination, listing and management procedures in the USA stand in stark contrast to those of Australia. The consent of the property owner is required, the area must already be an area of national conservation significance and a final and approved management plan must already be in place before an area is nominated. Indeed it is worthy to note that unlike Australia, there has been no litigation with respect to the implementation of the World Heritage Convention. It is also noteworthy that before a wilderness area is dedicated as such in the USA, a review of all the competing interests in the area, not only the conservation values, is conducted over a period of up to ten years. In Australia, none of these conditions are required.

In view of the USA experience in dealing with world heritage issues and Australia's history of conflict and controversy on world heritage matters there is no doubt the Australian processes could be vastly improved. Special attention should be placed on increasing the involvement of State and Territory governments and local communities and in particular affected land owners or others with an interest in the process.

It is extremely disappointing that the rules of natural justice can be so comprehensively abused under the procedures for the management of world heritage areas. The unilateral closure by the Federal Government, without notice to the owner, of Bender's Quarry in south-west Tasmania in 1992, which had operated for 40 years, was an example of this abuse. The quarry, valued at approximately \$4 million dollars, was rendered useless and valueless, and despite a federal-state agreement signed by five senior representatives of these governments agreeing to pay compensation to the owner if there was a change in the management of the quarry, the Federal Government denied any legal liability to pay compensation for the closure. A review of the nomination, listing and management of world heritage in Australia should hasten a review of the concept of acquisition of property on just terms, pursuant to section 51 (xxix) of the Constitution. The compensation provisions of the World Heritage Properties Conservation Act 1983 require reform to protect all those with an interest in the land. For example, all people and businesses suffering economic loss resulting from world heritage nomination listing or management, should be entitled to compensation as a matter of law.

Because the legislative and administrative framework for the nomination, listing and management of world heritage areas is inadequate, these processes have been open to consistent abuse, primarily for political purposes. It is hoped that, together with the reform of these processes and a more certain federal/state balance of powers, we in Australia can substitute a politically divisive concept for one in which all Australians can be proud.

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APPENDIX – CHAPTER 2



UNITED NATIONS EDUCATIONAL, SCIENTIFIC
AND CULTURAL ORGANISATION

INTERGOVERNMENTAL COMMITTEE FOR THE
PROTECTION OF THE WORLD
CULTURAL AND NATURAL HERITAGE

Operational Guidelines for the Implementation
of the World Heritage Convention



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INTRODUCTION

1. The cultural heritage and the natural heritage are among the priceless and irreplaceable possessions, not only of each nation, but of mankind as a whole. The loss, through deterioration or disappearance, of any of these most prized possessions constitutes an impoverishment of the heritage of all the peoples in the world. Parts of that heritage, because of their exceptional qualities, can be considered to be of outstanding universal value and as such worthy of special protection against the dangers which increasingly threaten them.

2. In an attempt to remedy this perilous situation and to ensure, as far as possible, the proper identification, protection, conservation and presentation of the world's irreplaceable heritage, the Member States of UNESCO adopted in 1972 the Convention concerning the Protection of the World Cultural and Natural Heritage, hereinafter referred to as "the Convention". The Convention complements heritage conservation programmes at the national level and provides for the establishment of a "World Heritage Committee" and a "World Heritage Fund". Both the Committee and the Fund have been in operation since 1976.

3. The World Heritage Committee, hereinafter referred to as "the Committee", has four essential functions:

- (i) to identify, on the basis of nominations submitted by States Parties, cultural and natural properties of outstanding universal value which are to be protected under the Convention and to list those properties on the "World Heritage List";
- (ii) monitor the state of conservation of properties inscribed on the World Heritage List.
- (iii) to decide in case of urgent need which properties included in the World Heritage List are to be inscribed on the "List of World Heritage in Danger" ((only properties which require for their conservation major operations and for which assistance has been requested under the Convention can be considered));
- (iv) to determine in what way and under what conditions the resources in the World Heritage Fund can most advantageously be used to assist States Parties, as far as possible, in the Protection of their properties of outstanding universal value.

4. The Operational Guidelines which are set out below have been prepared for the purpose of informing States Parties to the Convention of the principles which guide the work of the Committee in establishing the World Heritage List and the List of World Heritage in Danger and in granting international assistance under the World Heritage Fund. These Guidelines also provide details on monitoring and other questions, mainly of a

procedural nature, which relate to the implementation of the Convention.

5. The Committee is fully aware that its decisions must be based on considerations which are as objective and scientific as possible, and that any appraisal made on its behalf must be thoroughly and responsibly carried out. It recognizes that objective and well considered decisions depend upon:

- carefully prepared criteria,
- thorough procedures,
- evaluation by qualified experts and the use of expert referees.

The Operational Guidelines have been prepared with these objectives in mind.

I. ESTABLISHMENT OF THE WORLD HERITAGE LIST

A. General Principles

6. The Committee agreed that the following general principles would guide its work in establishing the World Heritage List:

- (i) The Convention provides for the protection of those cultural and natural properties¹ deemed to be of outstanding universal value. It is not intended to provide for the protection of all properties of great interest, importance or value, but only for a select list of the most outstanding of these from an international viewpoint. The outstanding universal value of cultural and natural properties is defined by Articles 1 and 2 of the Convention. These definitions are interpreted by the Committee by using two sets of criteria: one set for cultural property and another set for natural property. The criteria and the conditions of authenticity or integrity adopted by the Committee for this purpose are set out in paragraphs 24 and 47 below.
- (ii) The criteria for the inclusion of properties in the World Heritage List have been elaborated to enable the Committee to act with full independence in evaluating the intrinsic merit of property, without regard to any other consideration (including the need for technical co-operation support).
- (iii) Efforts will be made to maintain a reasonable balance between the numbers of cultural heritage and the

¹Cf. definitions of "cultural heritage" and "natural heritage" in Articles 1 and 2 of the Convention are set out in paragraphs 23 and 43 below.

natural heritage properties entered on the List.

- (iv) Cultural and natural properties are included in the World Heritage List according to a gradual process and no formal limit is imposed either on the total number of properties included in the List or on the number of properties any individual State can submit at successive stages for inclusion therein.
- (v) Inscriptions of sites shall be deferred until evidence of the full commitment of the nominating government, within its means, is demonstrated. Evidence would take the forms of relevant legislation, staffing, funding, and management plans, as described below in Paragraph 24 (b) (ii) for cultural properties, and in Paragraph 44 (b) (vi) for natural properties.
- (vi) When a property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List. It should be placed on the World Heritage in Danger List, subsequently the procedure concerning the possible deletion from the List will be applied. This procedure is set out in paragraphs 48 to 56 below.
- (vii) In view of the difficulty in handling the large numbers of cultural nominations now being received, however, the Committee invites States Parties to consider whether their cultural heritage is already well represented on the List and if so to slow down voluntarily their rate of submission of further nominations. This would help in making it possible for the List to become more universally representative. By the same token, the Committee calls on States Parties whose cultural heritage is not yet adequately represented on the List and who might need assistance in preparing nominations of cultural properties to seek such assistance from the Committee.

B. Indications to States Parties concerning nominations to the List

7. The Committee requests each State Party to submit to it a tentative list of properties which it intends to nominate for inscription to the World Heritage List during the following five to ten years. This tentative list will constitute the "inventory" (provided for in Article 11 of the Convention) of the cultural and natural properties situated within the territory of each State Party and which it considers suitable for inclusion in the World Heritage List. The purpose of these tentative lists is to enable the Committee to evaluate within the widest possible context the "outstanding universal value" of each property nominated to the List. The Committee hopes that States Parties that have not yet submitted a tentative list will do so as early as possible. States Parties are reminded of the Committee's

earlier decision not to consider cultural nominations unless such a list of cultural properties has been submitted.

8. In order to facilitate the work of all concerned, the Committee requests States Parties to submit their tentative lists in a standard format (see Annex 1) which provides for information under the following headings:

- the name of the property;
- the geographical location of the property;
- a brief description of the property;
- a justification of the "outstanding universal value" of the property in accordance with the criteria and conditions of authenticity or integrity set out in paragraphs 24 and 44 below, taking account of similar properties both inside and outside the boundaries of the State concerned.

Natural properties should be grouped according to biogeographical provinces and cultural properties should be grouped according to cultural periods or areas. The order in which the properties listed would be presented for inscription should also be indicated, if possible.

9. The fundamental principle stipulated in the Convention is that properties nominated must be of outstanding universal value and the properties nominated therefore should be carefully selected. The criteria and conditions of authenticity or integrity against which the Committee will evaluate properties are set out in paragraphs 24 and 44 below. Within a given geo-cultural region, it may be desirable for States Parties to make comparative assessments for the harmonization of tentative lists and nominations of cultural properties. Support for the organization of meetings for this purpose may be requested under the World Heritage Fund.

10. Each nomination should be presented in the form of a well-argued case. It should be submitted on the appropriate form (see paragraph 65 below) and should provide all the information to demonstrate that the property nominated is truly of "outstanding universal value". Each nomination should be supported by all the necessary documentation, including suitable slides and maps and other material. With regard to cultural properties, States Parties are invited to attach to the nomination forms a brief analysis of references in world literature (e.g. reference works such as general or specialized encyclopaedias, histories of art or architecture, records of voyages and explorations, scientific reports, guidebooks, etc.) along with a comprehensive bibliography. With regard to newly-discovered properties, evidence of the attention which the discovery has received internationally would be equally helpful.

11. Under the "Juridical data" section of the nomination form

States Parties should provide, in addition to the legal texts protecting the property being nominated, an explanation of the way in which these laws actually operate. Such an analysis is preferable to a mere enumeration or compilation of the legal texts themselves.

12. When nominating properties belonging to certain well-represented categories of cultural property the nominating State Party should provide a comparative evaluation of the property in relation to other properties of a similar type, as already required in paragraph 7 with regard to the tentative lists.

13. In certain cases it may be necessary for States Parties to consult the Secretariat and the specialized NGO concerned informally before submitting nomination forms. The Committee reminds States Parties that assistance for the purpose of preparing comprehensive and sound nominations is available to them at their request under the World Heritage Fund.

14. In all cases, so as to maintain the objectivity of the evaluation process and to avoid possible embarrassment to those concerned, States Parties should refrain from giving undue publicity to the fact that a property has been nominated for inscription pending the final decision of the Committee on the nomination in question. Participation of local people in the nomination process is essential to make them feel a shared responsibility with the State Party in the maintenance of the site, but should not prejudice future decision-making by the Committee.

15. In nominating properties to the List, States Parties are invited to keep in mind the desirability of achieving a reasonable balance between the numbers of cultural heritage and natural heritage properties included in the World Heritage List.

16. In cases where a cultural and/or natural property which fulfils the criteria adopted by the Committee extends beyond national borders the States Parties concerned are encouraged to submit a joint nomination.

17. Whenever necessary for the proper conservation of a cultural or natural property nominated, an adequate "buffer zone" around a property should be provided and should be afforded the necessary protection. A buffer zone can be defined as an area surrounding the property which has restrictions placed on its use to give an added layer of protection; the area constituting the buffer zone should be determined in each case through technical studies. Details on the size, characteristics and authorized uses of a buffer zone, as well as a map indicating its precise boundaries, should be provided in the nomination file relating to the property in question.

18. In keeping with the spirit of the Convention, States Parties should as far as possible endeavour to include in their submissions properties which derive their outstanding universal

value from a particularly significant combination of cultural and natural features.

19. States Parties may propose in a single nomination a series of cultural or natural properties in different geographical locations, provided that they are related because they belong to:

- (i) the same historico-cultural group or
- (ii) the same type of property which is characteristic of the geographical zone
- (iii) the same geomorphological formation, the same biogeographic province, or the same ecosystem type

and provided that it is the series as such, and not its components taken individually, which is of outstanding universal value.

20. When a series of cultural or natural properties, as defined in paragraph 19 above, consists of properties situated in the territory of more than one State Party to the Convention, the States Parties concerned are encouraged to jointly submit a single nomination.

21. States Parties are encouraged to prepare plans for the management of each natural site nominated and for the safeguarding of each cultural property nominated. All information concerning these plans should be made available when technical co-operation is requested.

22. Where the intrinsic qualities of a property nominated are threatened by action of man and yet meet the criteria and the conditions of authenticity or integrity set out in paragraphs 24 and 44, an action plan outlining the corrective measures required should be submitted with the nomination file. Should the corrective measures submitted by the nominating State not be taken within the time proposed by the State, the property will be considered by the Committee for delisting in accordance with the procedure adopted by the Committee.

C. Criteria for the inclusion of cultural properties in the World Heritage List

23. The criteria for the inclusion of cultural properties in the World Heritage List should always be seen in relation to one another and should be considered in the context of the definition set out in Article 1 of the Convention which is reproduced below:

"monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."

24. A monument, group of buildings or site - as defined above - which is nominated for inclusion in the World Heritage List will be considered to be of outstanding universal value for the purpose of the Convention when the Committee finds that it meets one or more of the following criteria and the test of authenticity. Each property nominated should therefore:

- (a) (i) represent a masterpiece of human creative genius; or
- (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture, monumental arts or town-planning and landscape design; or
- (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; or
- (iv) be an outstanding example of a type of building or architectural ensemble or landscape which illustrates (a) significant stage(s) in human history; or
- (v) be an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change; or
- (vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (the Committee considers that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with other criteria cultural or natural);

and

- (b) (i) meet the test of authenticity in design, material, workmanship or setting and in the case of cultural landscapes their distinctive

character and components (the Committee stressed that reconstruction is only acceptable if it is carried out on the basis of complete and detailed documentation on the original and to no extent on conjecture).

- (ii) have adequate legal and/or traditional protection and management mechanisms to ensure the conservation of the nominated cultural property or cultural landscapes. The existence of protective legislation at the national, provincial or municipal level or well-established traditional protection and/or adequate management mechanisms is therefore essential and must be stated clearly on the nomination form. Assurances of the effective implementation of these laws and/or management mechanisms are also expected. Furthermore, in order to preserve the integrity of cultural sites, particularly those open to large numbers of visitors, the State Party concerned should be able to provide evidence of suitable administrative arrangements to cover the management of the property, its conservation and its accessibility to the public.

25. Nominations of immovable property which are likely to become movable will not be considered.

26. With respect to groups of urban buildings, the Committee has furthermore adopted the following Guidelines concerning their inclusion in the World Heritage List.

27. Groups of urban buildings eligible for inclusion in the World Heritage List fall into three main categories, namely:

- (i) towns which are no longer inhabited but which provide unchanged archaeological evidence of the past; these generally satisfy the criterion of authenticity and their state of conservation can be relatively easily controlled;
- (ii) historic towns which are still inhabited and which, by their very nature, have developed and will continue to develop under the influence of socio-economic and cultural change, a situation that renders the assessment of their authenticity more difficult and any conservation policy more problematical;
- (iii) new towns of the twentieth century which paradoxically have something in common with both the aforementioned categories: while their original urban organization is clearly recognizable and their authenticity is undeniable, their future is unclear because their development is largely uncontrollable.

28. The evaluation of towns that are no longer inhabited does

not raise any special difficulties other than those related to archaeological sites in general: the criteria which call for uniqueness or exemplary character have led to the choice of groups of buildings noteworthy for their purity of style, for the concentrations of monuments they contain and sometimes for their important historical associations. It is important for urban archaeological sites to be listed as integral units. A cluster of monuments or a small group of buildings is not adequate to suggest the multiple and complex functions of a city which has disappeared; remains of such a city should be preserved in their entirety together with their natural surroundings whenever possible.

29. In the case of inhabited historic towns the difficulties are numerous, largely owing to the fragility of their urban fabric (which has in many cases been seriously disrupted since the advent of the industrial era) and the runaway speed with which their surroundings have been urbanized. To qualify for inclusion, towns should compel recognition because of their architectural interest and should not be considered only on the intellectual grounds of the role they may have played in the past or their value as historical symbols under criterion (vi) for the inclusion of cultural properties in the World Heritage List (see paragraph 24 above). To be eligible for inclusion in the List, the spatial organization, structure, materials, forms and, where possible, functions of a group of buildings should essentially reflect the civilization or succession of civilizations which have prompted the nomination of the property. Four categories can be distinguished:

- (i) Towns which are typical of a specific period or culture, which have been almost wholly preserved and which have remained largely unaffected by subsequent developments. Here the property to be listed is the entire town together with its surroundings, which must also be protected;
- (ii) Towns that have evolved along characteristic lines and have preserved, sometimes in the midst of exceptional natural surroundings, spatial arrangements and structures that are typical of the successive stages in their history. Here the clearly defined historic part takes precedence over the contemporary environment;
- (iii) "Historic centres" that cover exactly the same area as ancient towns and are now enclosed within modern cities. Here it is necessary to determine the precise limits of the property in its widest historical dimensions and to make appropriate provision for its immediate surroundings;
- (iv) Sectors, areas or isolated units which, even in the residual state in which they have survived, provide coherent evidence of the character of a historic town which has disappeared. In such cases surviving areas

and buildings should bear sufficient testimony to the former whole.

30. Historic centres and historic areas should be listed only where they contain a large number of ancient buildings of monumental importance which provide a direct indication of the characteristic features of a town of exceptional interest. Nominations of several isolated and unrelated buildings which allegedly represent, in themselves, a town whose urban fabric has ceased to be discernible, should not be encouraged.

31. However, nominations could be made regarding properties that occupy a limited space but have had a major influence on the history of town planning. In such cases, the nomination should make it clear that it is the monumental group that is to be listed and that the town is mentioned only incidentally as the place where the property is located. Similarly, if a building of clearly universal significance is located in severely degraded or insufficiently representative urban surroundings, it should, of course, be listed without any special reference to the town.

32. It is difficult to assess the quality of new towns of the twentieth century. History alone will tell which of them will best serve as examples of contemporary town planning. The examination of the files on these towns should be deferred, save under exceptional circumstances.

33. Under present conditions, preference should be given to the inclusion in the World Heritage List of small or medium-sized urban areas which are in a position to manage any potential growth, rather than the great metropolises, on which sufficiently complete information and documentation cannot readily be provided that would serve as a satisfactory basis for their inclusion in their entirety.

34. In view of the effects which the entry of a town in the World Heritage List could have on its future, such entries should be exceptional. Inclusion in the List implies that legislative and administrative measures have already been taken to ensure the protection of the group of buildings and its environment. Informed awareness on the part of the population concerned, without whose active participation any conservation scheme would be impractical, is also essential.

35. With respect to cultural landscapes, the Committee has furthermore adopted the following guidelines concerning their inclusion in the World Heritage List.

36. Cultural landscapes represent the "combined works of nature and of man" designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal. They should be selected on the basis both of their outstanding universal value and of their representativity in

terms of a clearly defined geo-cultural region and also for their capacity to illustrate the essential and distinct cultural elements of such regions.

37. The term "cultural landscape" embraces a diversity of manifestations of the interaction between humankind and its natural environment.

38. Cultural landscapes often reflect specific techniques of sustainable land-use, considering the characteristics and limits of the natural environment they are established in, and a specific spiritual relation to nature. Protection of cultural landscapes can contribute to modern techniques of sustainable land-use and can maintain or enhance natural values in the landscape. The continued existence of traditional forms of land-use supports biological diversity in many regions of the world. The protection of traditional cultural landscapes is therefore helpful in maintaining biological diversity.

39. Cultural landscapes fall into three main categories, namely:

- (i) The most easily identifiable is the clearly defined landscape designed and created intentionally by man. This embraces garden and parkland landscapes constructed for aesthetic reasons which are often (but not always) associated with religious or other monumental buildings and ensembles.
- (ii) The second category is the organically evolved landscape. This results from an initial social, economic, administrative, and/or religious imperative and has developed its present form by association with and in response to its natural environment. Such landscapes reflect that process of evolution in their form and component features. They fall into two sub-categories:
 - a relict (or fossil) landscape is one in which an evolutionary process came to an end at some time in the past, either abruptly or over a period. Its significant distinguishing features are, however, still visible in material form.
 - a continuing landscape is one which retains an active social role in contemporary society closely associated with the traditional way of life, and in which the evolutionary process is still in progress. At the same time it exhibits significant material evidence of its evolution over time.
- (iii) The final category is the associative cultural landscape. The inclusion of such landscapes on the World Heritage List is justifiable by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural

evidence, which may be insignificant or even absent.

40. The extent of a cultural landscape for inclusion on the World Heritage List is relative to its functionality and intelligibility. In any case, the sample selected must be substantial enough to adequately represent the totality of the cultural landscape that it illustrates. The possibility of designating long linear areas which represent culturally significant transport and communication networks should not be excluded.

41. The general criteria for conservation and management laid down in paragraph 24.(b).(ii) above are equally applicable to cultural landscapes. It is important that due attention be paid to the full range of values represented in the landscape, both cultural and natural. The nominations should be prepared in collaboration with and the full approval of local communities.

42. The existence of a category of "cultural landscape", included on the World Heritage List on the basis of the criteria set out in paragraph 24 above, does not exclude the possibility of sites of exceptional importance in relation to both cultural and natural criteria continuing to be included. In such cases, their outstanding universal significance must be justified under both sets of criteria.

D. Criteria for the inclusion of natural properties in the World Heritage List

43. In accordance with Article 2 of the Convention, the following is considered as "natural heritage":

"natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

44. A natural heritage property - as defined above - which is submitted for inclusion in the World Heritage List will be considered to be of outstanding universal value for the purposes of the Convention when the Committee finds that it meets one or more of the following criteria and fulfils the conditions of integrity set out below. Sites nominated should therefore:

- (a) (i) be outstanding examples representing major stages of earth's history, including the record of life,

significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features; or

- (ii) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals; or
- (iii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance; or
- (iv) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation;

and

(b) also fulfil the following conditions of integrity:

- (i) The sites described in 44(a)(i) should contain all or most of the key interrelated and interdependent elements in their natural relationships; for example, an "ice age" area should include the snow field, the glacier itself and samples of cutting patterns, deposition and colonization (e.g. striations, moraines, pioneer stages of plant succession, etc.); in the case of volcanoes, the magmatic series should be complete and all or most of the varieties of effusive rocks and types of eruptions be represented.
- (ii) The sites described in 44(a)(ii) should have sufficient size and contain the necessary elements to demonstrate the key aspects of processes that are essential for the long-term conservation of the ecosystems and the biological diversity they contain; for example, an area of tropical rain forest should include a certain amount of variation in elevation above sea-level, changes in topography and soil types, patch systems and naturally regenerating patches; similarly a coral reef should include, for example, seagrass, mangrove or other adjacent ecosystems that regulate nutrient and sediment inputs into the reef.
- (iii) The sites described in 44(a)(iii) should be of outstanding aesthetic value and include areas that are essential for maintaining the beauty of the site; for example, a site whose scenic values

depend on a waterfall, should include adjacent catchment and downstream areas that are integrally linked to the maintenance of the aesthetic qualities of the site.

- (iv) The sites described in paragraph 44(a)(iv) should contain habitats for maintaining the most diverse fauna and flora characteristic of the biographic province and ecosystems under consideration; for example, a tropical savannah should include a complete assemblage of co-evolved herbivores and plants; an island ecosystem should include habitats for maintaining endemic biota; a site containing wide-ranging species should be large enough to include the most critical habitats essential to ensure the survival of viable populations of those species; for an area containing migratory species, seasonal breeding and nesting sites, and migratory routes, wherever they are located, should be adequately protected; international conventions, e.g. the Convention of Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), for ensuring the protection of habitats of migratory species of waterfowl, and other multi- and bilateral agreements could provide this assurance.
- (v) The sites described in paragraph 44(a) should have a management plan. When a site does not have a management plan at the time when it is nominated for the consideration of the World Heritage Committee, the State Party concerned should indicate when such a plan will become available and how it proposes to mobilize the resources required for the preparation and implementation of the plan. The State Party should also provide other document(s) (e.g. operational plans) which will guide the management of the site until such time when a management plan is finalized.
- (vi) A site described in paragraph 44(a) should have adequate long-term legislative, regulatory or institutional protection. The boundaries of that site should reflect the spatial requirements of habitats, species, processes or phenomena that provide the basis for its nomination for inscription on the World Heritage List. The boundaries should include sufficient areas immediately adjacent to the area of outstanding universal value in order to protect the site's heritage values from direct effects of human encroachment and impacts of resource use outside of the nominated area. The boundaries of the nominated site may coincide with one or more

existing or proposed protected areas, such as national parks or biosphere reserves. While an existing or proposed protected area may contain several management zones, only some of those zones may satisfy criteria described in paragraph 44(a); other zones, although they may not meet the criteria set out in paragraph 44(a), may be essential for the management to ensure the integrity of the nominated site; for example, in the case of a biosphere reserve, only the core zone may meet the criteria and the conditions of integrity, although other zones, i.e. buffer and transitional zones, would be important for the conservation of the biosphere reserve in its totality.

- (vii) Sites described in paragraph 44(a) should be the most important sites for the conservation of biological diversity. Biological diversity, according to the new global Convention on Biological Diversity, means the variability among living organisms in terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and includes diversity within species, between species and of ecosystems. Only those sites which are the most biologically diverse are likely to meet criterion (iv) of paragraph 44(a).

45. The evaluation of whether or not individual sites nominated by States Parties satisfy the natural heritage criteria and the conditions of integrity will be carried out by the World Conservation Union (IUCN) and will normally include,

Data assembly: Compilation of a standardized data sheet on the site using the nomination submitted by the States Party and other sources. Information on sites that are comparable to the nominated site is reviewed in order to enable a comparative evaluation of the nominated site.

External review: The nomination is sent to experts knowledgeable about the site for comments.

Field inspection: In most cases, missions are sent to evaluate the site and to discuss the nomination with national and local authorities.

Panel Review: A draft evaluation prepared on the basis of results obtained from the above three steps is reviewed by a panel of experts at IUCN Headquarters.

46. The evaluation report which is submitted to the Bureau of the World Heritage Committee, normally in mid-year, is an outcome

of the four steps mentioned above. (See paragraph 66 below for type of recommendations that the Bureau would make on nominations and the procedure which leads, by the end of the year, to decisions of the Committee on each nominated site.)

47. In principle, a site could be inscribed on the World Heritage List as long as it satisfies one of the four criteria and the relevant conditions of integrity. However, most inscribed sites have met two or more criteria. Nomination dossiers, IUCN evaluations and the final recommendations of the Committee on each inscribed site are available for consultation by States Parties which may wish to use such information as guides for identifying and elaborating nomination of sites within their own territories.

E. Procedure for the eventual deletion of properties from the World Heritage List

48. The Committee adopted the following procedure for the deletion of properties from the World Heritage List in cases:

- (a) where the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List; and
- (b) where the intrinsic qualities of a World Heritage site were already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time, have not been taken within the time proposed.

49. When a property inscribed on the World Heritage List has seriously deteriorated, or when the necessary corrective measures have not been taken within the time proposed, the State Party on whose territory the property is situated should so inform the Secretariat of the Committee.

50. When the Secretariat receives such information from a source other than the State Party concerned, it will, as far as possible, verify the source and the contents of the information in consultation with the State Party concerned and request its comments.

51. The Secretariat will request the competent advisory organization(s) (ICOMOS, IUCN or ICCROM) to forward comments on the information received.

52. The information received, together with the comments of the State Party and the advisory organization(s), will be brought to the attention of the Bureau of the Committee. The Bureau may take one of the following steps:

- (a) it may decide that the property has not seriously deteriorated and that no further action should be taken;

- (b) when the Bureau considers that the property has seriously deteriorated, but not to the extent that its restoration is impossible, it may recommend to the Committee that the property be maintained on the List, provided that the State Party takes the necessary measures to restore the property within a reasonable period of time. The Bureau may also recommend that technical co-operation be provided under the World Heritage Fund for work connected with the restoration of the property, proposing to the State Party to request such assistance, if it has not already been done;
- (c) when there is evidence that the property has deteriorated to the point where it has irretrievably lost those characteristics which determined its inclusion in the List, the Bureau may recommend that the Committee delete the property from the List; before any such recommendation is submitted to the Committee, the Secretariat will inform the State Party concerned of the Bureau's recommendation; any comments which the State Party may make with respect to the recommendation of the Bureau will be brought to the attention of the Committee, together with the Bureau's recommendation;
- (d) when the information available is not sufficient to enable the Bureau to take one of the measures described in (a), (b) or (c) above, the Bureau may recommend to the Committee that the Secretariat be authorized to take the necessary action to ascertain, in consultation with the State Party concerned, the present condition of the property, the dangers to the property and the feasibility of adequately restoring the property, and to report to the Bureau on the results of its action; such measures may include the sending of a fact-finding mission or the consultation of specialists. In cases where emergency action is required, the Bureau may itself authorize the financing from the World Heritage Fund of the emergency assistance that is required.

53. The Committee will examine the recommendation of the Bureau and all the information available and will take a decision. Any such decision shall, in accordance with Article 13 (8) of the Convention, be taken by a majority of two-thirds of its members present and voting. The Committee shall not decide to delete any property unless the State Party has been consulted on the question.

54. The State Party shall be informed of the Committee's decision and public notice of this decision shall be immediately given by the Committee.

55. If the Committee's decision entails any modification to the World Heritage List, this modification will be reflected in the

next updated list that is published.

56. In adopting the above procedure, the Committee was particularly concerned that all possible measures should be taken to prevent the deletion of any property from the List and was ready to offer technical co-operation as far as possible to States Parties in this connection. Furthermore, the Committee wishes to draw the attention of States Parties to the stipulations of Article 4 of the Convention which reads as follows:

"Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State..."

57. In this connection, the Committee recommends that States Parties co-operate with the advisory bodies which have been asked by the Committee to carry out monitoring and reporting on its behalf on the progress of work undertaken for the preservation of properties inscribed on the World Heritage List.

58. The World Heritage Committee invites the States Parties to the Convention Concerning the Protection of the World Cultural and Natural Heritage to inform the Committee, through the UNESCO Secretariat, of their intention to undertake or to authorize in an area protected under the Convention major restorations or new constructions which may affect the World Heritage value of the property. Notice should be given as soon as possible (for instance, before drafting basic documents for specific projects) and before making any decisions that would be difficult to reverse, so that the Committee may assist in seeking appropriate solutions to ensure that the world heritage value of the site is fully preserved.

F. Guidelines for the evaluation and examination of nominations

59. The World Heritage List should be as representative as possible of all cultural and natural properties which meet the Convention's requirement of outstanding universal value and the cultural and natural criteria and the conditions of authenticity or integrity adopted by the Committee (see paragraphs 24 to 44 above).

60. Each cultural property, including its state of preservation, should be evaluated relatively, that is, it should be compared with that of other property of the same type dating from the same period, both inside and outside the State Party's borders.

61. Each natural site should be evaluated relatively, that is, it should be compared with other sites of the same type, both inside and outside the State Party's borders, within a biogeographic province or migratory pattern.

62. Furthermore ICOMOS and IUCN should pay particular attention to the following points which relate to the evaluation and examination of nominations:

- (a) both NGOs are encouraged to be as strict as possible in their evaluations;
- (b) the manner of the professional evaluation carried out by ICOMOS and IUCN should be fully described when each nomination is presented;
- (c) ICOMOS is requested to make comparative evaluations of properties belonging to the same type of cultural property;
- (d) IUCN is requested to make comments and recommendations on the integrity and future management of each property recommended by the Bureau, during its presentation to the Committee;
- (e) the NGO concerned is encouraged to present slides on the properties recommended for the World Heritage List during the preliminary discussions which take place prior to the examination of individual proposals for inscription on the List.

63. Representatives of a State Party, whether or not a member of the Committee, shall not speak to advocate the inclusion in the List of a property nominated by that State, but only to deal with a point of information in answer to a question.

64. The criteria for which a specific property is included in the World Heritage List will be set out by the Committee in its reports and publications, along with a clearly stated summary of the characteristics which justified the inclusion of the property which should be reflected in its future management.

G. Format and content of nominations

65. The same printed form approved by the Committee is used for the submission of nominations of cultural and natural properties. The following information and documentation is to be provided: (For the nominations of groups of buildings or sites the specific documentation to be provided is listed in sub-paragraph (f) below.)

(a) Specific location

Country

State, province or region

Name of property

Maps and plans with indications of location of property and of geographical co-ordinates

(b) Juridical data

Owner

Legal status:

- . category of ownership (public or private)
- . details of legal and administrative provisions for the protection of the property. The nature of the legal texts as well as their conditions of implementation should be clearly specified
- . state of occupancy and accessibility to the general public

Responsible administration

- . details should be given of the mechanism or body already set up or intended to be established in order to ensure the proper management of the property

(c) Identification

Description and inventory

Photographic and cinematographic documentation

History

Bibliography

(d) State of preservation/conservation

Diagnosis

Agent responsible for preservation/conservation

History of preservation/conservation

Measures for preservation/conservation (including management plans or proposals for such plans)

Development plans for the region

(e) Justification for inclusion in the World Heritage List

Information should be provided under three separate headings as follows: (i) the reasons for which the property is considered to meet one or more of the criteria set out under paragraphs 24 and 44 above; (ii) an evaluation of the property's present state of preservation as compared with similar properties elsewhere; (iii) indications as to the authenticity of the property.

(f) Specific documentation to be provided with nominations of groups of buildings or sites

If the nomination concerns a group of buildings or site as described in paragraph 23 above² specific

² For example:

- a town centre, a village, a street, a square or other urban or rural architectural ensemble, or an archaeological site, or

- a series of cultural properties which are geographically dispersed but are representative of a specific

documentation and juridical data are to be provided:

(i) Maps and plans

Three maps are to be provided:

- one map which shows the exact location of the property and its immediate natural and built environment (with, if necessary in annex, a series of topographical plans).

Scale: between 1/20.000 or 1/50.000 and 1/100.000

Date of publication: the most recent prior to presentation of the nomination

- one map which precisely delimits the perimeter of the nominated area and which clearly indicates the location of each monument listed in the nomination. The nominated property can be one uninterrupted area or composed of several separate areas. In the latter case, the perimeter of each of these areas must be indicated and the nature of protection of the intermediate zones must also be described.

Scale: between 1/5,000 and 1/25,000

- one map indicating the zones of different degrees of legal protection which might exist:

- inside the perimeter of the nominated property
- outside the perimeter of the nominated property

Scale: between 1/5,000 and 1/25,000. This map should be of a size that lends itself to easy reproduction.

(ii) Photographic documentation³

This documentation should include:

- an aerial view
- views of the monuments listed in the

type of property as described in paragraph 19 above.

³ Photographs must be recent, i.e. preferably taken not more than one year prior to presentation of the nomination file. In addition historic photographs may be desirable.

- nomination (interior and exterior)
- panoramic views taken in different directions from outside the proposed perimeter (skyline)
- views taken inside the proposed perimeter which give an exact idea of the urban landscape (townscape)
- a selection of high quality original colour slides for which the non-exclusive reproduction rights are granted to UNESCO on the form provided for this purpose. It should be noted that colour slides are absolutely necessary for the presentation of the property to the Bureau and to the Committee.

Audio-visual documents, where applicable.

(iii) Supplementary documentation

Information on institutions or associations concerned with the study or safeguard of the site

- within the country
- abroad

(iv) Legal information

- laws or decrees which govern the protection of monuments and sites (date and text)
- decrees or orders which protect the nominated property (date and text)
- master plan for historic preservation, land-use plan, urban development plan, regional development plan or other infrastructure projects
- town planning regulations and orders issued in application of these plans.

Indications should be given as to whether these various juridical provisions prevent:

- uncontrolled exploitation of the ground below the property
- the demolition and reconstruction of buildings situated within the protected zones
- the raising of the height of buildings

- the transformation of the urban fabric

What are the penalties foreseen in case of a contravention of these juridical provisions?

What, if any, juridical or other measures exist which encourage the revitalization of the property concerned in full respect of its historic authenticity and its social diversity?

(v) Administrative framework

Responsible administration:

- at the national or federal level
- at the level of federated States or provinces
- at the regional level
- at the local level

B. Procedure and timetable for the processing of nominations⁴

66. The annual schedule set out below has been fixed for the receipt and processing of nominations to the World Heritage List. It should be emphasized, however, that the process of nominating properties to the World Heritage List is an ongoing one. Nominations to the List can be submitted at any time during the year. Those received by 1 July of a given year will be considered during the following year. Those received after 1 July of a given year can only be considered in the second subsequent year. Despite the inconvenience it may cause certain States Parties, the Committee has decided to bring forward the deadline for submission of nominations in order to ensure that all working documents can be made available to the Bureau as well as States members of the Committee no later than 6 weeks before the start of the sessions of the Bureau and the Committee. This will also enable the Committee at its annual December session to be made aware of the number and nature of nominations to be examined at its next session the following year.

1 July

Deadline for receipt by the Secretariat of nominations to be considered by the Committee the following year.

15 September

The Secretariat:

- (1) registers each nomination and thoroughly verifies its contents and accompanying documentation. In the case of incomplete nominations, the Secretariat must immediately request the missing information from

⁴ The new timetable for the processing of nominations will be effective in 1996.

States Parties.

- (2) transmits nominations, provided they are complete, to the appropriate international non-governmental organization (ICOMOS, IUCN or both), which:

immediately examines each nomination to ascertain those cases in which additional information is required and takes the necessary steps, in co-operation with the Secretariat, to obtain the complementary data, and

By 1 April

The appropriate non-governmental organization undertakes a professional evaluation of each nomination according to the criteria adopted by the Committee. It transmits these evaluations to the Secretariat under three categories:

- (a) properties which are recommended for inscription without reservation;
- (b) properties which are not recommended for inscription;
- (c) properties whose eligibility for inscription is not considered absolutely clear.

During April

The Secretariat checks the evaluations of the non-governmental organizations and ensures that States members of the Committee receive them by 1 May with available documentation.

June/July

The Bureau examines the nominations and makes its recommendations thereon to the Committee under the following four categories:

- (a) properties which it recommends for inscription without reservation;
- (b) properties which it does not recommend for inscription;
- (c) properties that need to be referred back to the nominating State for further information or documentation;
- (d) properties whose examination should be deferred on the ground that a more in-depth assessment or study is needed.

July-November

The report of the Bureau is transmitted by the Secretariat as soon as possible to all States Parties members of the Committee, as well as to all States Parties concerned. The Secretariat endeavours to obtain from the States Parties concerned the additional information requested on properties under category (c) above and transmits this information to ICOMOS, IUCN and States members of the Committee. If the requested information is not obtained by 1 October, the nomination will not be eligible for review by the Committee at its regular session in the same year. Nominations assigned to category (c) by the Bureau may not be examined except in the case that missing information at the time of the Bureau was factual. Nominations assigned to category (d) will not be examined by the Committee the same year.

December

The Committee examines the nominations on the basis of the Bureau's recommendations, together with any additional information provided by the States Parties concerned as well as the comments thereon of ICOMOS and IUCN. It classifies its decisions on nominated properties in the following three categories:

- (a) properties which it inscribes on the World Heritage List;
- (b) properties which it decides not to inscribe on the List;
- (c) properties whose consideration is deferred.

January

The Secretariat forwards the report of the December session of the World Heritage Committee, which contains all the decisions taken by the Committee, to all States Parties.

67. In the event that a State Party wishes to nominate an extension to a property already inscribed on the World Heritage List, the same documentation should be provided and the same procedure shall apply as for new nominations, set out in paragraph 65 above. This provision will not apply for extensions which are simple modifications of these limits of the property in question: in this case, the request for modification of these limits is submitted directly to the Bureau which will examine in particular the relevant maps and plans. The Bureau can approve such modifications, or it may consider that the change is sufficiently important to constitute an extension of the property, in which case the procedure for new nominations will apply.

68. The normal deadlines for the submission and processing of nominations will not apply in the case of properties which, in the opinion of the Bureau, after consultation with the competent

international non-governmental organization, would unquestionably meet the criteria for inclusion in the World Heritage List and which have suffered damage from disaster caused by natural events or by human activities. Such nominations will be processed on an emergency basis.

II. MONITORING THE STATE OF CONSERVATION OF PROPERTIES INSCRIBED ON THE WORLD HERITAGE LIST

69. One of the essential functions of the Committee is to monitor the state of conservation of properties inscribed on the World Heritage List and to take action thereupon. In the following, a distinction will be made between systematic and reactive monitoring.

A. Systematic monitoring and reporting

70. Systematic monitoring and reporting is the continuous process of observing the conditions of World Heritage sites with periodic reporting on its state of conservation.

The objectives of systematic monitoring and reporting are:

World Heritage site: Improved site management, advanced planning, reduction of emergency and ad-hoc interventions, and reduction of costs through preventive conservation.

State Party: Improved World Heritage policies, advanced planning, improved site management and preventive conservation.

Region: Regional cooperation, regional World Heritage policies and activities better targeted to the specific needs of the region.

Committee/Secretariat: Better understanding of the conditions of the sites and of the needs on the site, national and regional levels. Improved policy and decision making.

71. It is the prime responsibility of the States Parties to put in place on-site monitoring arrangements as an integral component of day-to-day conservation and management of the sites. States Parties should do so in close collaboration with the site managers or the agency with management authority. It is necessary that every year the conditions of the site be recorded by the site manager or the agency with management authority.

72. The States Parties are invited to submit to the World Heritage Committee through the World Heritage Centre, every five years, a scientific report on the state of conservation of the World Heritage sites on their territories. To this end, the States Parties may request expert advice from the Secretariat or the advisory bodies. The Secretariat may also commission expert advice with the agreement of the States Parties.

73. To facilitate the work of the Committee and its Secretariat and to achieve greater regionalization and decentralization of World Heritage work, these reports will be examined separately by region as determined by the Committee. The World Heritage Centre will synthesize the national reports by regions. In doing so, full use will be made of the available expertise of the advisory bodies and other organizations.

74. The Committee will decide for which regions state of conservation reports should be presented to its forthcoming sessions. The States Parties concerned will be informed at least one year in advance so as to give them sufficient time to prepare the state of conservation reports.

75. The Secretariat will take the necessary measures for adequate World Heritage information collection and management, making full use, to the extent possible, of the information/documentation services of the advisory bodies and others.

B. Reactive monitoring

76. Reactive monitoring is the reporting by the World Heritage Centre, other sectors of UNESCO and the advisory bodies to the Bureau and the Committee on the state of conservation of specific World Heritage sites that are under threat. To this end, the States Parties shall submit to the Committee through the World Heritage Centre, specific reports and impact studies each time exceptional circumstances occur or work is undertaken which may have an effect on the state of conservation of the site. Reactive monitoring is foreseen in the procedures for the eventual deletion of properties from the World Heritage List as set out in paras. 50-58. It is also foreseen in reference to properties inscribed, or to be inscribed, on the List of World Heritage in Danger as set out in paras. 83-90.

III. ESTABLISHMENT OF THE LIST OF WORLD HERITAGE IN DANGER

A. Guidelines for the inclusion of properties in the List of World Heritage in Danger

77. In accordance with Article 11, paragraph 4, of the Convention, the Committee may include a property in the List of World Heritage in Danger when the following requirements are met:

- (i) the property under consideration is on the World Heritage List;
- (ii) the property is threatened by serious and specific danger;
- (iii) major operations are necessary for the conservation of the property;
- (iv) assistance under the Convention has been requested

for the property; the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inclusion of a site on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat.

B. Criteria for the inclusion of properties in the List of World Heritage in Danger

78. A World Heritage property - as defined in Articles 1 and 2 of the Convention - can be entered on the List of World Heritage in Danger by the Committee when it finds that the condition of the property corresponds to at least one of the criteria in either of the two cases described below.

79. In the case of cultural properties:

- (i) ASCERTAINED DANGER - The property is faced with specific and proven imminent danger, such as:
 - (a) serious deterioration of materials;
 - (b) serious deterioration of structure and/or ornamental features;
 - (c) serious deterioration of architectural or town-planning coherence;
 - (d) serious deterioration of urban or rural space, or the natural environment;
 - (e) significant loss of historical authenticity;
 - (f) important loss of cultural significance.
- (ii) POTENTIAL DANGER - The property is faced with threats which could have deleterious effects on its inherent characteristics. Such threats are, for example:
 - (a) modification of juridical status of the property diminishing the degree of its protection;
 - (b) lack of conservation policy;
 - (c) threatening effects of regional planning projects;
 - (d) threatening effects of town planning;
 - (e) outbreak or threat of armed conflict;
 - (f) gradual changes due to geological, climatic or other environmental factors.

80. In the case of natural properties:

(i) ASCERTAINED DANGER - The property is faced with specific and proven imminent danger, such as:

- (a) A serious decline in the population of the endangered species or the other species of outstanding universal value which the property was legally established to protect, either by natural factors such as disease or by man-made factors such as poaching.
- (b) Severe deterioration of the natural beauty or scientific value of the property, as by human settlement, construction of reservoirs which flood important parts of the property, industrial and agricultural development including use of pesticides and fertilizers, major public works, mining, pollution, logging, firewood collection, etc.
- (c) Human encroachment on boundaries or in upstream areas which threaten the integrity of the property.

(ii) POTENTIAL DANGER - The property is faced with major threats which could have deleterious effects on its inherent characteristics. Such threats are, for example:

- (a) a modification of the legal protective status of the area;
- (b) planned resettlement or development projects within the property or so situated that the impacts threaten the property;
- (c) outbreak or threat of armed conflict;
- (d) the management plan is lacking or inadequate, or not fully implemented.

81. In addition, the factor or factors which are threatening the integrity of the property must be those which are amenable to correction by human action. In the case of cultural properties, both natural factors and man-made factors may be threatening, while in the case of natural properties, most threats will be man-made and only very rarely with a natural factor (such as an epidemic disease) be threatening to the integrity of the property. In some cases, the factors threatening the integrity of a property may be corrected by administrative or legislative action, such as the cancelling of a major public works project or the improvement of legal status.

82. The Committee may wish to bear in mind the following supplementary factors when considering the inclusion of a

cultural or natural property in the List of World Heritage in Danger:

- (a) Decisions which affect World Heritage properties are taken by Governments after balancing all factors. The advice of the World Heritage Committee can often be decisive if it can be given before the property becomes threatened.
- (b) Particularly in the case of ascertained danger, the physical or cultural deteriorations to which a property has been subjected should be judged according to the intensity of its effects and analyzed case by case.
- (c) Above all in the case of potential danger to a property, one should consider that:
 - the threat should be appraised according to the normal evolution of the social and economic framework in which the property is situated;
 - it is often impossible to assess certain threats - such as the threat of armed conflict - as to their effect on cultural or natural properties;
 - some threats are not imminent in nature, but can only be anticipated, such as demographic growth.
- (d) Finally, in its appraisal the Committee should take into account any cause of unknown or unexpected origin which endangers a cultural or natural property.

C. Procedure for the inclusion of properties in the List of World Heritage in Danger

83. When considering the inclusion of a property in the List of World Heritage in Danger, the Committee shall develop, and adopt, as far as possible, in consultation with the State Party concerned, a programme for corrective measures.

84. In order to develop the programme referred to in the previous paragraph, the Committee shall request the Secretariat to ascertain, as far as possible in cooperation with the State Party concerned, the present condition of the property, the dangers to the property and the feasibility of undertaking corrective measures. The Committee may further decide to send a mission of qualified observers from IUCN, ICOMOS, ICCROM or other organizations to visit the property, evaluate the nature and extent of the threats and propose the measures to be taken.

85. The information received, together with the comments as appropriate of the State Party and the advisory organization(s) shall be brought to the attention of the Committee by the Secretariat.

86. The Committee shall examine the information available and take a decision concerning the inscription of the property on the List of World Heritage in Danger. Any such decision shall be taken by a majority of two-thirds of the Committee members present and voting. The Committee will then define the programme of corrective action to be taken. This programme will be proposed to the State Party concerned for immediate implementation.

87. The State Party concerned shall be informed of the Committee's decision and public notice of the decision shall immediately be issued by the Committee, in accordance with Article 11.4 of the Convention.

88. The Committee shall allocate a specific, significant portion of the World Heritage Fund to financing of possible assistance to World Heritage properties inscribed on the List of World Heritage in Danger.

89. The Committee shall review at regular intervals the state of property on the List of World Heritage in Danger. This review shall include such monitoring procedures and expert missions as might be determined necessary by the Committee.

90. On the basis of these regular reviews, the Committee shall decide, in consultation with the State Party concerned whether:

- (i) additional measures are required to conserve the property;
- (ii) to delete the property from the List of World Heritage in Danger if the property is no longer under threat;
- (iii) to consider the deletion of the property from both the List of World Heritage in Danger and the World Heritage List if the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List, in accordance with the procedure set out in paragraphs 48 to 58 above.

IV. INTERNATIONAL ASSISTANCE

A. Different forms of assistance available under the World Heritage Fund

(i) Preparatory assistance

91. Assistance is available to States Parties for the purpose of:

- (a) preparing tentative lists of cultural and/or natural properties suitable for inclusion in the World Heritage List;

- (b) organizing meetings for the harmonization of tentative lists within the same geo-cultural area;
- (c) preparing nominations of cultural and natural properties to the World Heritage List; and
- (d) preparing requests for technical co-operation, including requests relating to the organization of training courses.

This type of assistance, known as "preparatory assistance", can take the form of consultant services, equipment or, in exceptional cases, financial grants. The budgetary ceiling for each preparatory assistance project is fixed at \$15,000.

92. Requests for preparatory assistance should be forwarded to the Secretariat which will transmit them to the Chairperson, who will decide on the assistance to be granted. Request forms (reference WHC/5) can be obtained from the Secretariat.

(ii) Emergency assistance

93. States Parties may request emergency assistance for work in connection with cultural and natural properties included or suitable for inclusion in the World Heritage List and which have suffered severe damage due to sudden, unexpected phenomena (such as sudden land subsidence, serious fires or explosions, flooding) or are in imminent danger of severe damage caused by these phenomena. Emergency assistance does not concern cases of damage or deterioration that has been caused by gradual processes such as decay, pollution, erosion, etc. Such assistance may be made available for the following purposes:

- (a) to prepare urgent nominations of properties for the World Heritage List in conformity with paragraph 65 of these Guidelines;
- (b) to draw up an emergency plan to safeguard properties inscribed on or nominated to the World Heritage List;
- (c) to undertake emergency measures for the safeguarding of a property inscribed on or nominated to the World Heritage List.

94. Requests for emergency assistance may be sent to the Secretariat at any time using Form WHC/5. The World Heritage Centre should consult to the extent possible relevant advisory bodies and then submit these requests to the Chairperson who has the authorization to approve emergency requests up to an amount of US\$50,000 whereas the Bureau can approve requests up to an amount of US\$75,000.

(iii) Training

95. States Parties may request support for the training of specialised staff at all levels in the field of identification.

protection, conservation, presentation and rehabilitation of the cultural and natural heritage. The training must be related to the implementation of the World Heritage Convention.

96. Priority in training activities will be given to group training at the local or regional levels, particularly at national or regional centres in accordance with Article 23 of the Convention. The training of individual persons will be essentially limited to short term refresher programmes and exchanges of experience.

97. Requests for the training of specialised staff at the national or regional level should contain the following information:

- (a) details on the training course concerned (courses offered, level of instruction, teaching staff, number of students and country of origin, date, place and duration, etc.) and, when applicable, the functional responsibility of each participant with respect to a designated World Heritage site; priority should be given, if funds are not sufficient to satisfy all requests, to those concerning management or conservation personnel of inscribed properties;
- (b) type of assistance requested (financial contribution to costs of training, provision of specialised teaching staff, provision of equipment, books and educational materials for training courses);
- (c) approximate cost of support requested, including as appropriate tuition fees, daily subsistence allowance, allocation for purchase of educational material, travel costs to and from training centre, etc.
- (d) other contributions: national financing, received or anticipated multilateral or bilateral contributions;
- (e) for recurring training courses, an in-depth report of the results obtained in each previous session shall be submitted by the recipient government or organization. The report shall be forwarded to the appropriate advisory body for review and for its recommendations in connection with additional funding requests, as appropriate.

98. Requests for support for individual training courses should be submitted on the standard "Application for Fellowship" form used for all fellowships administered by UNESCO and which can be obtained from UNESCO National Commissions, UNESCO offices and the offices of the United Nations Development Programme in Member States, as well as from the Secretariat. Each request should be accompanied by a statement indicating the relationship of the proposed study plan to the implementation of the World Heritage Convention within the State Party submitting the request and by a commitment to submit a final technical report on the results

obtained as a result of the training grant.

99. All requests for support for training activities should be transmitted to the Secretariat which will ensure that the information is complete and forward these requests along with an estimation of the costs to the Chairperson for his approval. In this regard the Chairperson can approve amounts up to \$20,000. Requests for sums above this amount follow the same procedure for approval as for requests for technical cooperation set out in paragraphs 101-106.

(iv) Technical co-operation

100. States Parties can request technical co-operation for work foreseen in safeguarding projects for properties included in the World Heritage List. This assistance can take the forms outlined in paragraph 22 of the Convention for World Heritage properties.

101. In order to make best use of the limited resources of the World Heritage Fund and because of the increasing number of cultural sites to be assisted, the Committee, while recognizing the importance of archaeological objects coming from sites inscribed on the World Heritage List, has decided not to accept requests which may be submitted for equipment for archaeological site museums whose function is the preservation of movables.

102. The following information should be provided in requests for technical co-operation:

(a) Details of property

- date of inscription in the World Heritage List,
- description of property and of dangers to property,
- legal status of property;

(b) Details of request

- scientific and technical information on the work to be undertaken,
- detailed description of equipment requested (notably make, type, voltage, etc.) and of required personnel (specialists and workmen), etc.,
- if appropriate, details on the "training" component of the project,
- schedule indicating when the project activities will take place;

(c) Cost of proposed activities

- paid nationally,
 - requested under the Convention,
 - other multilateral or bilateral contributions received or expected, indicating how each contribution will be used;
- (d) National body responsible for the project and details of project administration
- (e) The Committee, wishing to establish a link between the monitoring of the state of conservation of World Heritage Sites and the granting of international assistance, has established as a requirement that requests for technical cooperation be accompanied by a state of conservation report of the property or site concerned.

103. The Secretariat, if necessary, will request the State Party concerned to provide further information. The Secretariat can also ask for expert advice from the appropriate organization (ICOMOS, IUCN, ICCROM).

104. Large-scale technical cooperation requests (that is those exceeding \$30,000) should be submitted to the Secretariat as early as possible each year. Those received before 31 August will be dealt with by the Committee the same year. Those received after 31 August will be processed by the Secretariat in the order in which they are received and will be considered by the Committee the same year if it has been possible to complete their processing in time. All large-scale requests will be considered by the Bureau which will make recommendations on them to the Committee.

105. The Bureau will consider the requests which are presented at its meetings and will make recommendations thereon to the Committee. The Secretariat will forward the Bureau's recommendation to all the States members of the Committee.

106. If the recommendation is positive, the Secretariat will proceed with all the preparatory work necessary for implementing the technical co-operation immediately after the Committee has decided to approve the project.

107. At the Committee meeting, the Committee will make a decision on each request for technical cooperation, and for emergency assistance and training beyond amounts authorized for approval by the Chairperson and Bureau, taking account of the Bureau's recommendation. Representatives of a States Party, whether or not a member of the Committee, shall not speak to advocate the approval of an assistance request submitted by that State, but only to deal with a point of information in answer to a question. The Committee's decisions will be forwarded to the States Parties and the Centre will proceed to implement approved projects.

108. The above schedule does not apply, however, to projects the cost of which does not exceed a ceiling of \$30,000 for which the following simplified procedure will be applied.

- (a) In the case of requests not exceeding \$20,000, the Secretariat after examining the dossier and receiving the advice of ICCROM, ICOMOS or IUCN, as appropriate, will forward the request accompanied by all other relevant documents directly to the Chairperson, who is authorized to take decisions on the financing of such projects up to the total amount set aside for this purpose in the annual allocation from the World Heritage Fund, on the understanding that no more than 20 percent of the total annual assistance budget, including technical cooperation and training (but excluding emergency assistance and preparatory assistance, for which separate rules have been established) may be allocated by the Chairperson. The Chairperson is not authorized to approve requests submitted by his own country.
- (b) The Bureau is authorized to approve requests up to a maximum of \$30,000 except for requests from States members of the Bureau; in such cases, the Bureau can only make recommendations to the Committee.

(v) Assistance for promotional activities

109. (a) at the regional and international levels:

The Committee has agreed to support the holding of meetings which could:

- help to create interest in the Convention within the countries of a given region;
- create a greater awareness of the different issues related to the implementation of the Convention to promote more active involvement in its application;
- be a means of exchanging experiences;
- stimulate joint promotional activities.

(b) at the national level:

The Committee felt that requests concerning national activities for promoting the Convention could be considered only when they concern:

- meetings specifically organized to make the Convention better known or for the creation of national World Heritage associations, in accordance with Article 17 of the Convention;

- preparation of information material for the general promotion of the Convention and not for the promotion of a particular site.

The World Heritage Fund shall provide only small contributions towards national promotional activities on a selective basis and for a maximum amount of \$5,000. However, requests for sums above this amount could exceptionally be approved for projects which are of special interest: the Chairperson's agreement would be required and the maximum amount approved would be \$10,000.

B. Order of priorities for the granting of international assistance

110. Without prejudicing the provisions of the Convention, which shall always prevail, the Committee agreed on the following order of priorities with respect to the type of activities to be assisted under the Convention:

- emergency measures to save property included, or nominated for inclusion, in the World Heritage List (see paragraph 93 above);
- preparatory assistance for drawing up tentative lists of cultural and/or natural properties suitable for inclusion in the World Heritage List as well as nominations of types of properties under-represented on the list and requests for technical co-operation;
- projects which are likely to have a multiplier effect ("seed money") because they:
 - . stimulate general interest in conservation;
 - . contribute to the advancement of scientific research;
 - . contribute to the training of specialized personnel;
 - . generate contributions from other sources.

111. The Committee also agreed that the following factors would in principle govern its decisions in granting assistance under the Convention:

- (i) the urgency of the work and of the protective measures to be taken;
- (ii) the legislative, administrative and financial commitment of the recipient State to protect and preserve the property;
- (iii) the cost of the project;
- (iv) the interest for, and exemplary value of, the project in respect of scientific research and the development

of cost/effective conservation techniques;

- (v) the educational value both for the training of local experts and for the general public;
- (vi) the cultural and ecological benefits accruing from the project, and
- (vii) the social and economic consequences.

112. Properties included in the World Heritage List are considered to be equal in value. For this reason, the criteria proposed above make no reference to the relative value of the properties. A balance will be maintained between funds allocated to projects for the preservation of the cultural heritage on the one hand and projects for the conservation of the natural heritage on the other hand.

113. Requests for emergency, training and technical cooperation shall be referred, if deemed necessary by the Secretariat, to the appropriate advisory body (IUCN, ICOMOS, and/or ICCROM) for professional review and evaluation, and its recommendations shall be presented to the Bureau and the Committee for action.

C. Agreement to be concluded with States receiving international assistance

114. When technical co-operation on a large scale is granted to a State Party, an agreement will be concluded between the Committee and the State concerned in which will be set out:

- (a) the scope and nature of the technical co-operation granted;
- (b) the obligations of the Government, including the submission of mid-term and final financial and technical reports, which shall be referred, if deemed necessary by the Secretariat, to the appropriate advisory body (IUCN, ICOMOS, ICCROM) for review, and summaries of which shall be available to the Committee.
- (c) the facilities, privileges and immunities to be applied by the Government to the Committee and/or UNESCO, to the property, funds and assets allocated to the project as well as to the officials and other persons performing services on behalf of the Committee and/or UNESCO in connection with the project.

115. The text of a standard agreement will be in conformity with UNESCO regulations.

116. The Committee decided to delegate authority to the Chairperson to sign such agreements on its behalf. In exceptional circumstances, or when necessary for practical purposes, the Chairperson may delegate authority to a member of the Secretariat

whom he will designate.

D. Implementation of projects

117. In order to ensure the efficient implementation of a project for which technical co-operation has been granted under the World Heritage Fund, the Committee recommends that a single body - whether national, regional, local, public or private - should be entrusted with the responsibility of executing the project in the State Party concerned.

E. Conditions for the granting of international assistance

118. The conditions for and types of international assistance are established by Articles 19 to 26 of the World Heritage Convention. Establishing a parallel between the conditions of eligibility for the World Heritage Committee set out in Article 16 of the Convention, the Committee decided, at its thirteenth session (1989), that States who were in arrears of payment of their contributions to the World Heritage Fund would not be able to receive a grant of international assistance in the following calendar year, it being understood that this provision would not apply in case of emergency assistance and training as defined in these Guidelines. In making this decision, the Committee wished to emphasize the importance which it accorded to States Parties paying their entire contribution within the periods set out in Article 16 of the Convention.

V. WORLD HERITAGE FUND

119. The Committee decided that contributions offered to the World Heritage Fund for international assistance campaigns and other UNESCO projects for any property inscribed on the World Heritage List shall be accepted and used as international assistance pursuant to Section V of the Convention, and in conformity with the modalities established for carrying out the campaign or project.

120. States Parties to the Convention who anticipate making contributions towards international assistance campaigns or other UNESCO projects for any property inscribed on the List are encouraged to make their contributions through the World Heritage Fund.

121. The financial regulations for the Fund are set out in document WHC/7.

VI. BALANCE BETWEEN THE CULTURAL AND THE NATURAL HERITAGE IN THE IMPLEMENTATION OF THE CONVENTION

122. In order to improve the balance between the cultural and natural heritage in the implementation of the Convention, the

Committee has recommended that the following measures be taken:

- (a) Preparatory assistance to States Parties should be granted on a priority basis for:
 - (i) the establishment of tentative lists of cultural and natural properties situated in their territories and suitable for inclusion in the World Heritage List;
 - (ii) the preparation of nominations of types of properties underrepresented in the World Heritage List.
- (b) States Parties to the Convention should provide the Secretariat with the name and address of the governmental organization(s) primarily responsible for cultural and natural properties, so that copies of all official correspondence and documents can be sent by the Secretariat to these focal points as appropriate.
- (c) States Parties to the Convention should convene at regular intervals at the national level a joint meeting of those persons responsible for natural and cultural heritage in order that they may discuss matters pertaining to the implementation of the Convention. This does not apply to States Parties where one single organization is dealing with both cultural and natural heritage.
- (d) States Parties to the Convention should choose as their representatives persons qualified in the field of natural and cultural heritage, thus complying with Article 9, paragraph 3, of the Convention. States members of the Committee should communicate in advance to the Secretariat the names and status of their representatives.
- (e) The Committee, deeply concerned with maintaining a balance in the number of experts from the natural and cultural fields represented on the Bureau, urges that every effort be made in future elections in order to ensure that:
 - (i) the chair is not held by persons with expertise in the same field, either cultural or natural, for more than two successive years;
 - (ii) at least two "cultural" and at least two "natural" experts are present at Bureau meetings to ensure balance and credibility in reviewing nominations to the World Heritage List.
- (f) In accordance with Article 10.2 of the Convention and with Rule 7 of the Rules of Procedure, the Committee shall, at any time, invite to its meetings public or

private bodies or individuals who would attend as observers and augment the expertise available to it. These observers shall be chosen with a view to a balanced participation between the natural and cultural heritage.

VII. OTHER MATTERS

A. Use of the World Heritage Emblem and the name, symbol or depiction of World Heritage sites

123. At its second session, the Committee adopted the World Heritage Emblem which had been designed by Mr. Michel Olyff. This emblem symbolizes the interdependence of cultural and natural properties: the central square is a form created by man and the circle represents nature, the two being intimately linked. The emblem is round, like the world, but at the same time it is a symbol of protection. The Committee decided that the two versions proposed by the artist (see Annex 2) could be used, in any colour, depending on the use, the technical possibilities and considerations of an artistic nature. In practice however, the second version is usually preferred by States Parties and has been used by the Secretariat for promotional activities.

124. Properties included in the World Heritage List should be marked with the emblem which should, however, be placed in such a way that it does not visually impair the property in question.

125. States Parties to the Convention should take all possible measures to prevent the use of the emblem of the Convention and the use of the name of the Committee and the Convention in their respective countries by any group or for any purpose not explicitly recognized and approved by the Committee. The World Heritage emblem should, in particular, not be used for any commercial purposes unless specific authorization is obtained from the Committee.

126. The name, symbol or depiction of a World Heritage site, or of any element thereof, should not be used for commercial purposes unless written authorization has been obtained from the State concerned on the principles of using the said name, symbol or depiction, and unless the exact text or display has been approved by that State and, as far as possible, by the national authority specifically concerned with the protection of the site. Any such utilization should be in conformity with the reasons for which the property has been placed on the World Heritage List.

B. Production of plaques to commemorate the inclusion of properties in the World Heritage List

127. These plaques are designed to inform the public of the country concerned and foreign visitors, that the site visited has a particular value which has been recognized by the international

community. In other words, the site is exceptional, of interest not only to one nation, but also to the whole world. However, these plaques have an additional function which is to inform the general public about the World Heritage Convention or at least about the World Heritage concept and the World Heritage List.

128. The Committee has adopted the following Guidelines for the production of these plaques:

- the plaque should be so placed that it can easily be seen by visitors, without disfiguring the site;
- the World Heritage symbol should appear on the plaque;
- the text should mention the site's exceptional universal value; in this regard it might be useful to give a short description of the site's outstanding characteristics. States may, if they wish, use the descriptions appearing in the various World Heritage publications or in the World Heritage exhibit, and which may be obtained from the Secretariat;
- the text should make reference to the World Heritage Convention and particularly to the World Heritage List and to the international recognition conferred by inscription on this List (however, it is not necessary to mention at which session of the Committee the site was inscribed);
- it may be appropriate to produce the text in several languages for sites which receive many foreign visitors.

129. The Committee proposed the following text as an example:

"(Name of site) has been inscribed upon the World Heritage List of the Convention concerning the Protection of the World Cultural and Natural Heritage. Inscription on this List confirms the exceptional universal value of a cultural or natural site which deserves protection for the benefit of all humanity."

This text could be then followed by a brief description of the site concerned.

C. Rules of Procedure of the Committee

130. The Rules of Procedure of the Committee, adopted by the Committee at its first session and amended at its second and third sessions, are to be found in document WHC/1.

D. Meetings of the World Heritage Committee

131. In years when the General Assembly of States Parties is

held, the ordinary session of the World Heritage Committee will take place as soon as possible after the Assembly.

132. As provided for in Article 10.3 of the Convention and in accordance with Rules 20-21 of the Rules of Procedure, the Committee shall constitute sub-committees during its regular sessions to examine selected items of business referred to them with the object of reporting and making recommendations to the full Committee for action.

E. Meetings of the Bureau of the World Heritage Committee

133. The Bureau shall meet twice a year, once in June/July and a second time immediately preceding the Committee's regular session. The newly elected Bureau shall meet as necessary during the Committee's regular session.

F. Participation of experts from developed countries

134. In order to ensure a fair representation within the Committee of the various geographical and cultural areas, the Committee decided to include in its budget a sum intended to cover the cost of participation, in its sessions and sessions of its Bureau, of representatives of States members of the Committee which are on the list of least developed countries issued by the United Nations but only for persons who are experts in conservation of the cultural or natural heritage.

135. Requests for assistance to participate in the Bureau and Committee meetings should reach the Secretariat at least four weeks before the session concerned. These requests will be considered in the limit of resources available as decided by the Committee, in decreasing order of NGP of each State member of the Committee, and primarily for one representative from each State. In no event may the Fund finance more than two representatives by State, who must in this case be one expert in the natural and one in the cultural heritage field.

G. Publication of the World Heritage List

136. An up-to-date version of the World Heritage List and the List of the World Heritage in Danger will be published every year.

137. The name of the States having nominated the properties inscribed on the World Heritage List will be presented in the published form of the List under the following heading:
"Contracting State having submitted the nomination of the property in accordance with the Convention".

H. Action at the national level to promote a greater awareness of the activities undertaken under the Convention

138. States Parties should promote the establishment and activities of associations concerned with the safeguarding of cultural and natural sites.

139. States Parties are reminded of Articles 17 and 27 of the Convention concerning the establishment of national, public and private foundations or associations whose purpose is to invite donations for the protection of the world heritage and the organization of educational and information programmes to strengthen appreciation and respect by their peoples of this heritage.

I. Links with other Conventions and Recommendations

140. The World Heritage Committee has recognized the collective interest that would be advanced by closer coordination of its work with other international conservation instruments. These include the 1949 Geneva Convention, the 1954 Hague Convention, the 1970 UNESCO Convention, the Ramsar Convention, and CITES, as well as other regional conventions and future conventions that will pursue conservation objectives, as appropriate. The Committee will invite representatives of the intergovernmental bodies under related conventions to attend its meetings as observers. Similarly, the Secretariat will appoint a representative to observe meetings of the other intergovernmental bodies upon receipt of an invitation. The Secretariat will ensure through the World Heritage Centre appropriate coordination and information-sharing between the Committee and other conventions, programmes and international organizations related to the conservation of cultural and natural heritage.

Annex 1

MODEL FOR PRESENTING A TENTATIVE LIST

Name of country _____

List drawn up by _____

Date _____

NAME OF PROPERTY(*)

GEOGRAPHICAL LOCATION

DESCRIPTION

JUSTIFICATION OF "OUTSTANDING UNIVERSAL VALUE"

- Criteria met:

- Assurances of authenticity or integrity:

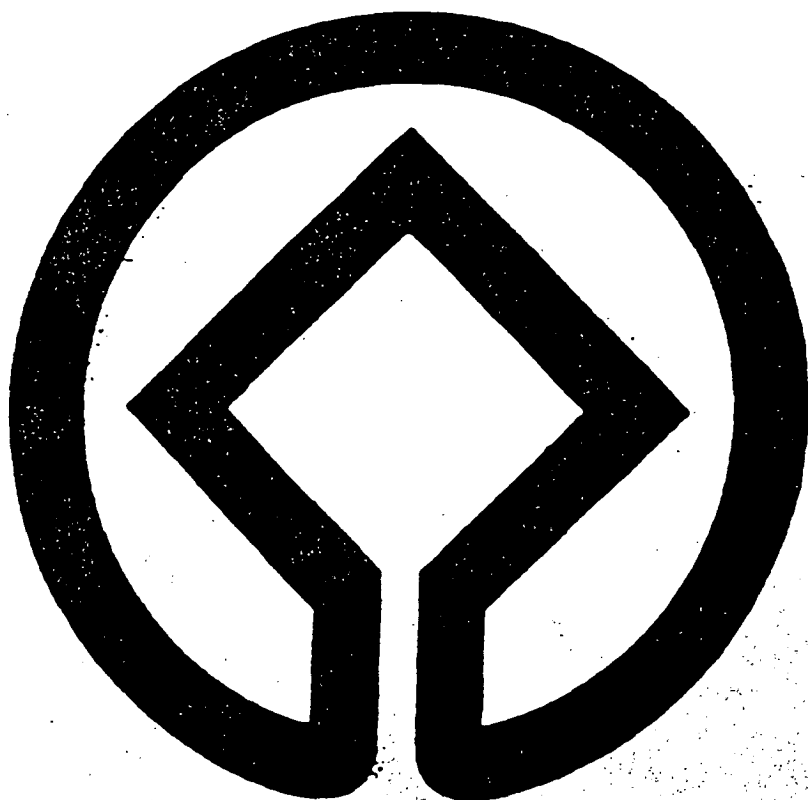
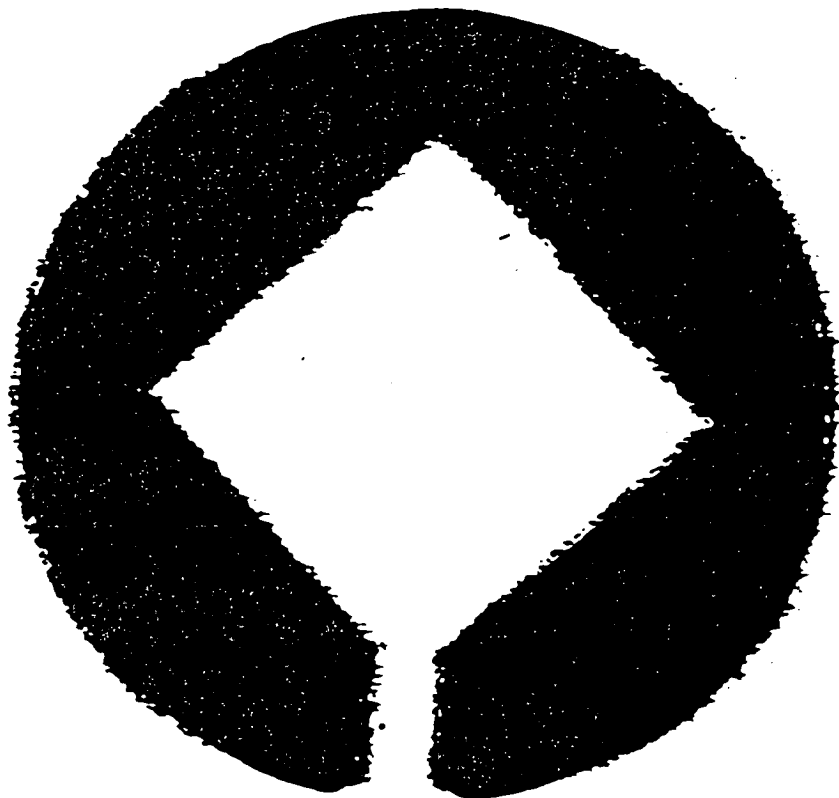
- Comparison with other similar properties:

Please present, if possible, in the order to be nominated.

Annex 2

WORLD HERITAGE EMBLEM/EMBLEME DU PATRIMOINE MONDIAL

(adopted by the World Heritage Committee
at its second session/adopté par le Comité du
patrimoine mondial lors de sa deuxième session)

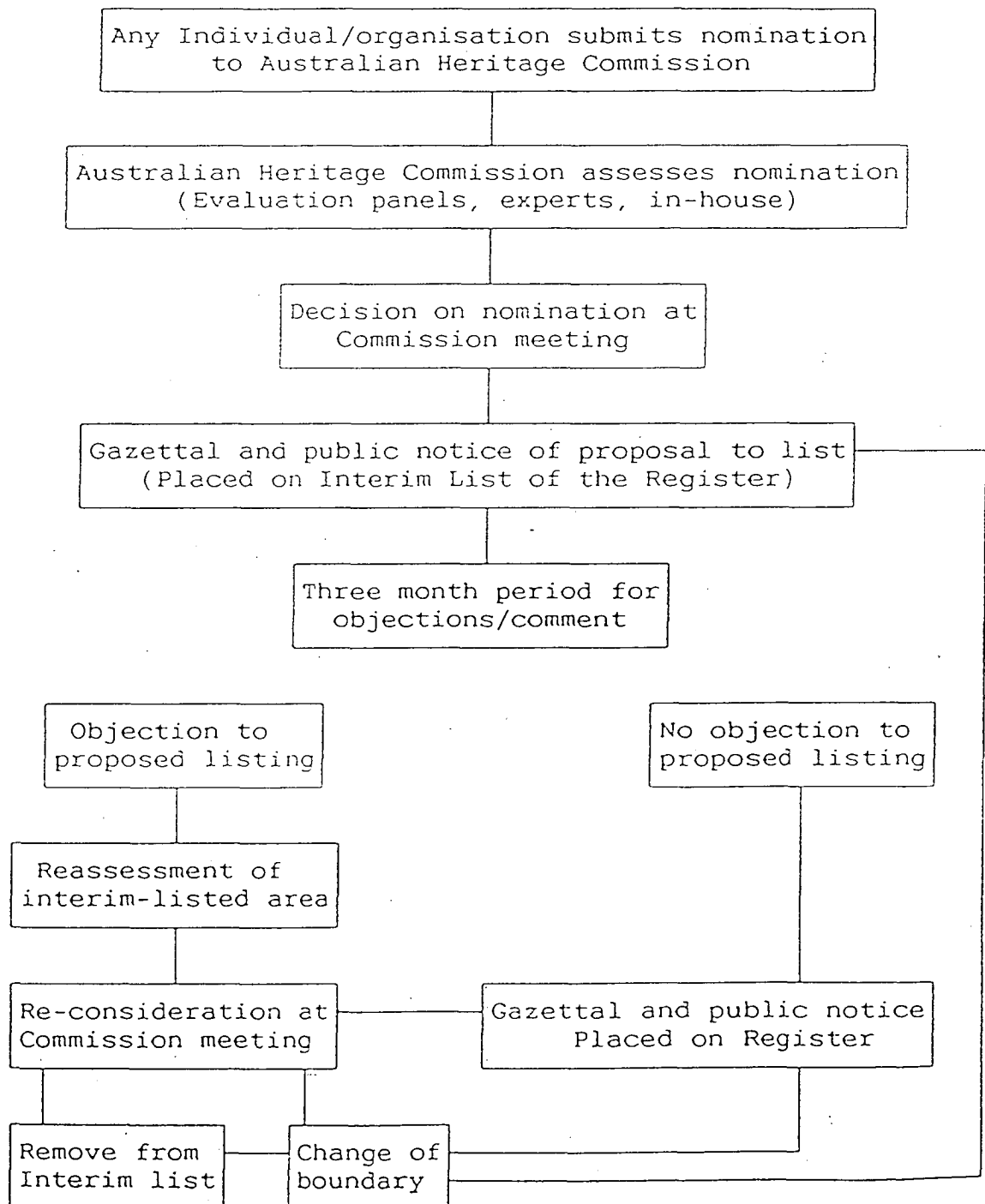


APPENDIX – CHAPTER 3

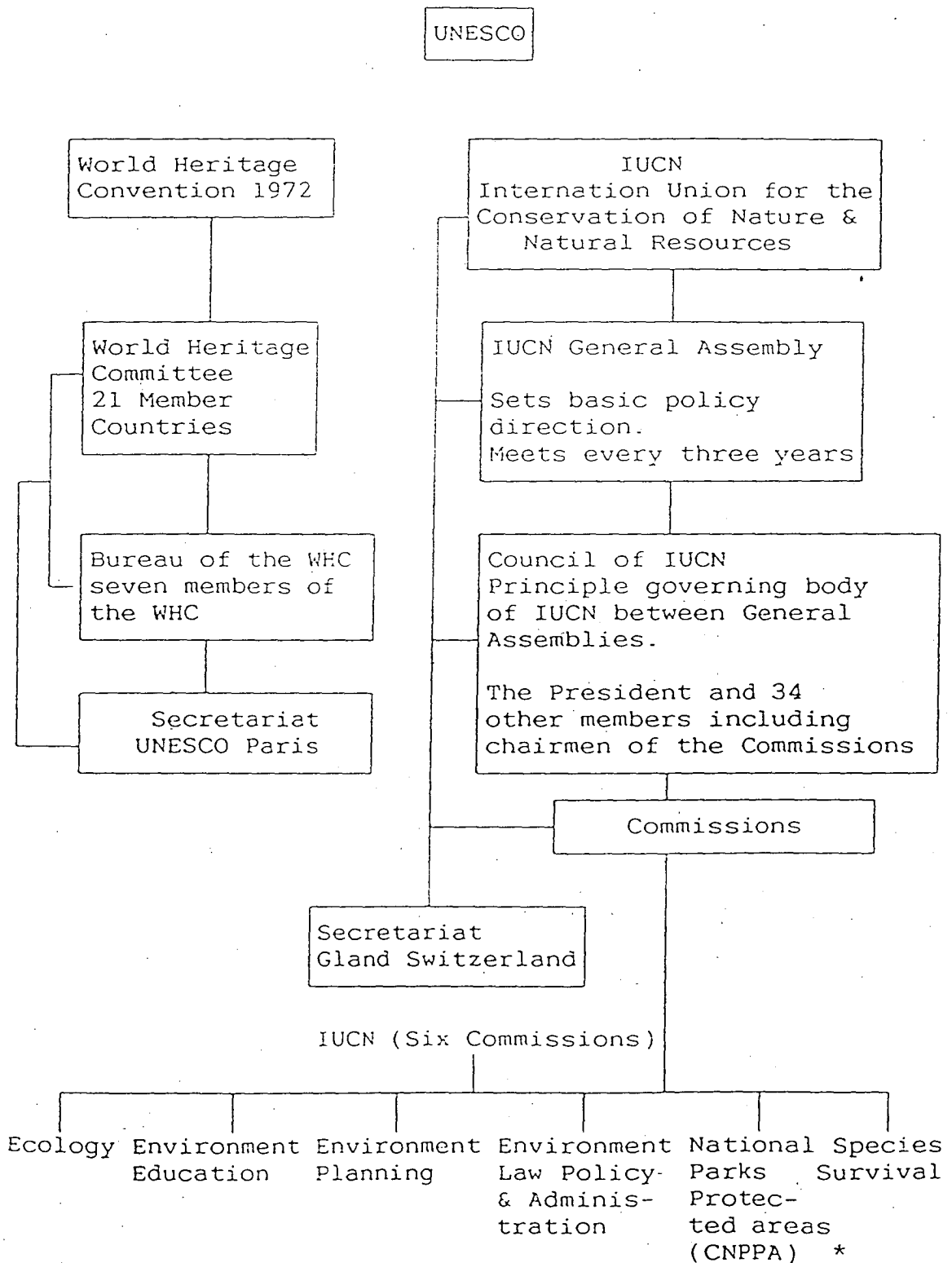
The following chart shows some of the differences between World Heritage listing and listing on the Australian Register of the National Estate.

	REGISTER OF THE NATIONAL ESTATE	WORLD HERITAGE LIST
Administration of legislation	Australian Heritage Commission	Department of the Environment, Sport and Territories
Nomination	Any individual/group	Australian Government
Values	National Estate significance – local to international value	Outstanding universal value
Types of value	Natural and cultural	Natural & cultural
Criteria	Australian Heritage Commission	World Heritage Committee
Assessment	Australian Heritage Commission	World Heritage Bureau
Decision on listing	Australian Heritage Commission	World Heritage Committee
Tenure	No change in tenure	No change in tenure
Commonwealth obligations	Yes : for Commonwealth proposals affecting places listed in the Register, Commonwealth Ministers, departments and authorities must seek prudent and feasible alternatives, minimise adverse effects and seek advice of the Australian Heritage Commission for activities having a significant adverse effect (Section 20 Australian Heritage Commission Act).	Yes : Commonwealth has obligation to protect world heritage values under World Heritage Convention and the <u>World Heritage Properties Conservation Act 1983</u> by ensuring appropriate management.
State/Territory obligations	None	No legislative obligations, but day-to-day management is carried out by State/Territory in most cases pursuant to a jointly agreed (between the Commonwealth and the State/Territory) management plan.

NOMINATION PROCESS FOR THE
REGISTER OF THE NATIONAL ESTATE

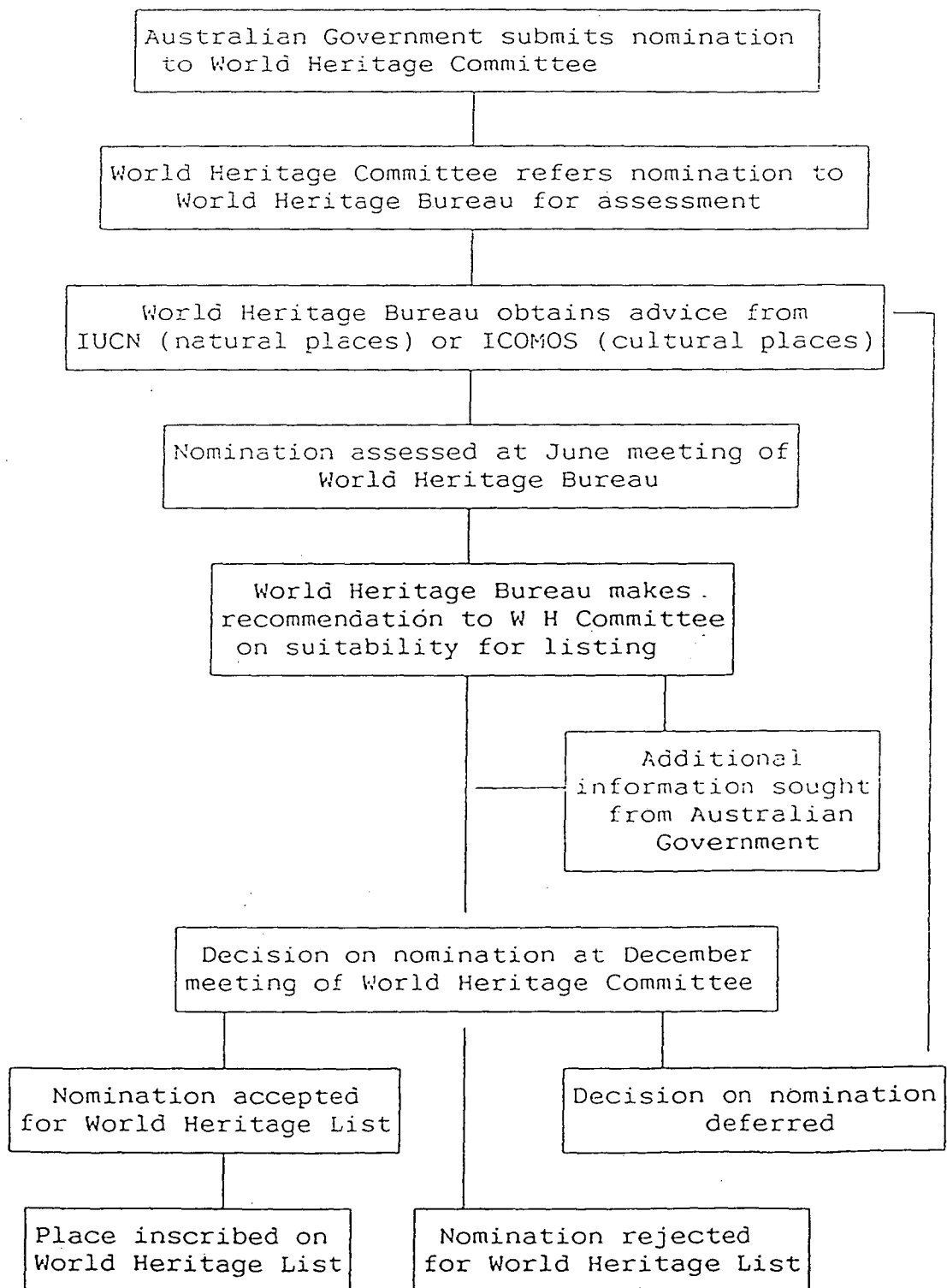


WORLD HERITAGE ORGANISATIONAL CHART



* Provides IUCN with scientific and technical information re : selection, establishment and management of National Parks and other protected areas.

AN OUTLINE OF THE PROCESS OF
INSCRIBING PLACES ON
THE WORLD HERITAGE LIST



APPENDIX – CHAPTER 4

INTERGOVERNMENTAL AGREEMENT ON THE ENVIRONMENT

SCHEDULE 8

WORLD HERITAGE

1. The States recognise that the Commonwealth has an international obligation as a party to the World Heritage Convention to ensure the identification, protection, conservation, presentation and transmission to future generations of Australia's natural and cultural heritage of 'outstanding universal value'.
2. The Commonwealth will consult the States and use its best endeavours to obtain their agreement on the compilation of an indicative list of World Heritage properties. The States agree to consult the relevant local government bodies and interested groups (including conservation and industry groups) on properties for inclusion on the indicative list prior to submission to the Commonwealth. Should conservation or any other groups or individuals make suggestions on an indicative list direct to the Commonwealth these will be referred to the relevant State for comment.
3. The Commonwealth will consult with the relevant State or States, and use its best endeavours to obtain their agreement, on nominations to the World Heritage List.
4. Where the relevant State or States have agreed to a nomination, the preparation of that nomination for World Heritage listing will be the primary responsibility of the relevant State or States and will be undertaken in close consultation with the Commonwealth. In the case of properties that transcend State boundaries, the Commonwealth will coordinate preparation of the nomination. The Commonwealth is responsible for ensuring the nomination is in accordance with the World Heritage Convention and Guidelines and submitting the nomination to UNESCO.
5. Arrangements for the management of a property will be determined as far as practicable prior to the nomination. The management arrangements will take into consideration the continuation of the State's management responsibilities for the property while preserving the Commonwealth's responsibilities under the World Heritage Convention.



TASMANIAN GOVERNMENT

Media Release

RAY GROOM, MHA

Premier

18 January, 1994.

Tasmania supports Western Australia in its concerns about the steady erosion of the rights and responsibilities of States under the Keating Government and previous Labor Governments, the Premier, Mr Ray Groom, said today.

"Australia is a federation but this fact of life has been ignored by Mr Keating and his ministry.

"I agree with Richard Court's plan for an audit of State and Federal responsibilities.

"I have no doubt the audit will disclose a very dangerous trend towards centralisation of power in Canberra.

"This issue has been raised many times by myself and previous Premiers of Tasmania.

"We have suffered very badly through World Heritage listings and the abuse of the National Estate concept as well as in funding.

"This discussion is very timely and I welcome it," Mr Groom said.

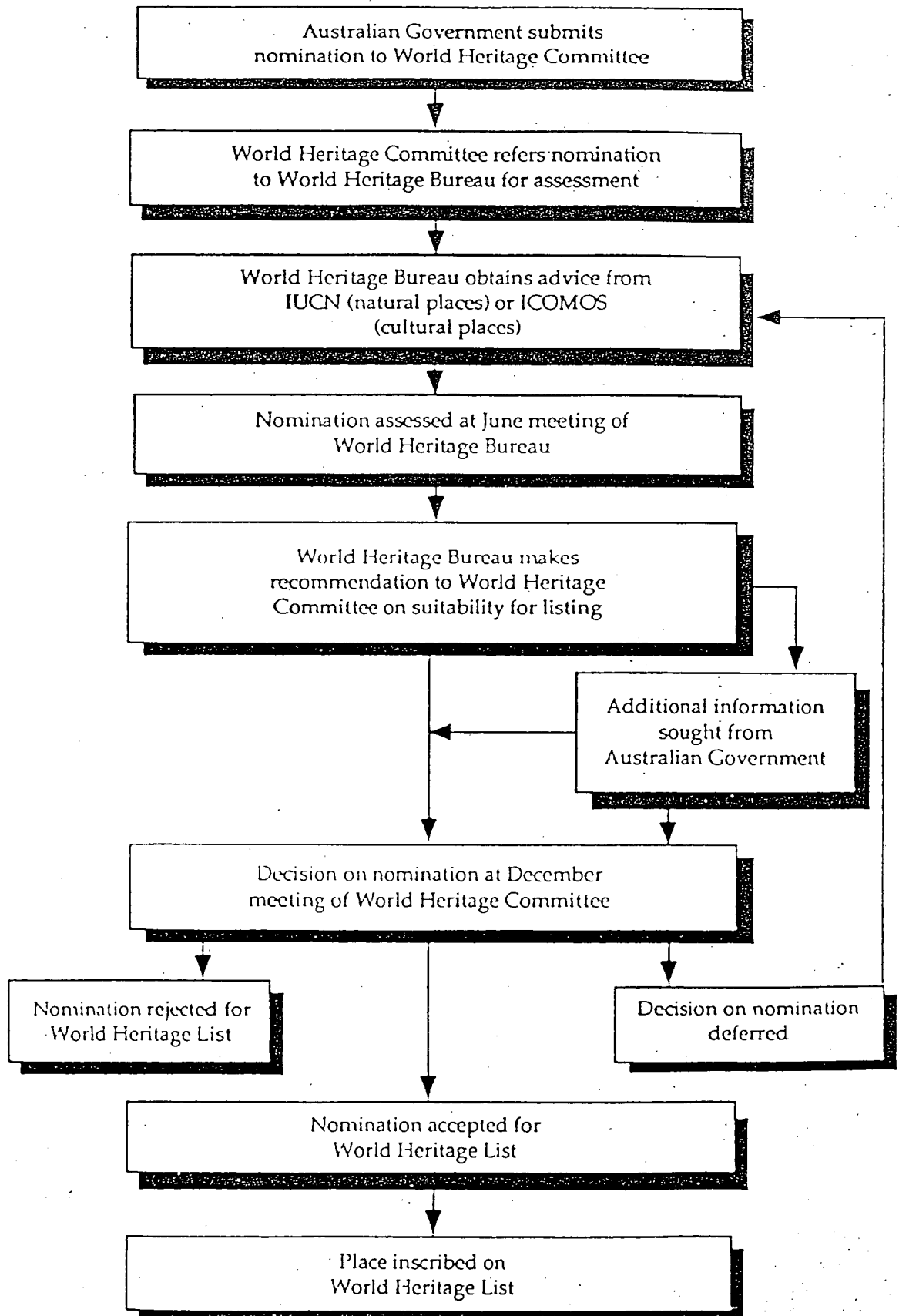
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APPENDIX – CHAPTER 5

WORLD HERITAGE PROCESS



WORLD HERITAGE NOMINATION - IUCN TECHNICAL EVALUATION

TASMANIAN WILDERNESS (AUSTRALIA)

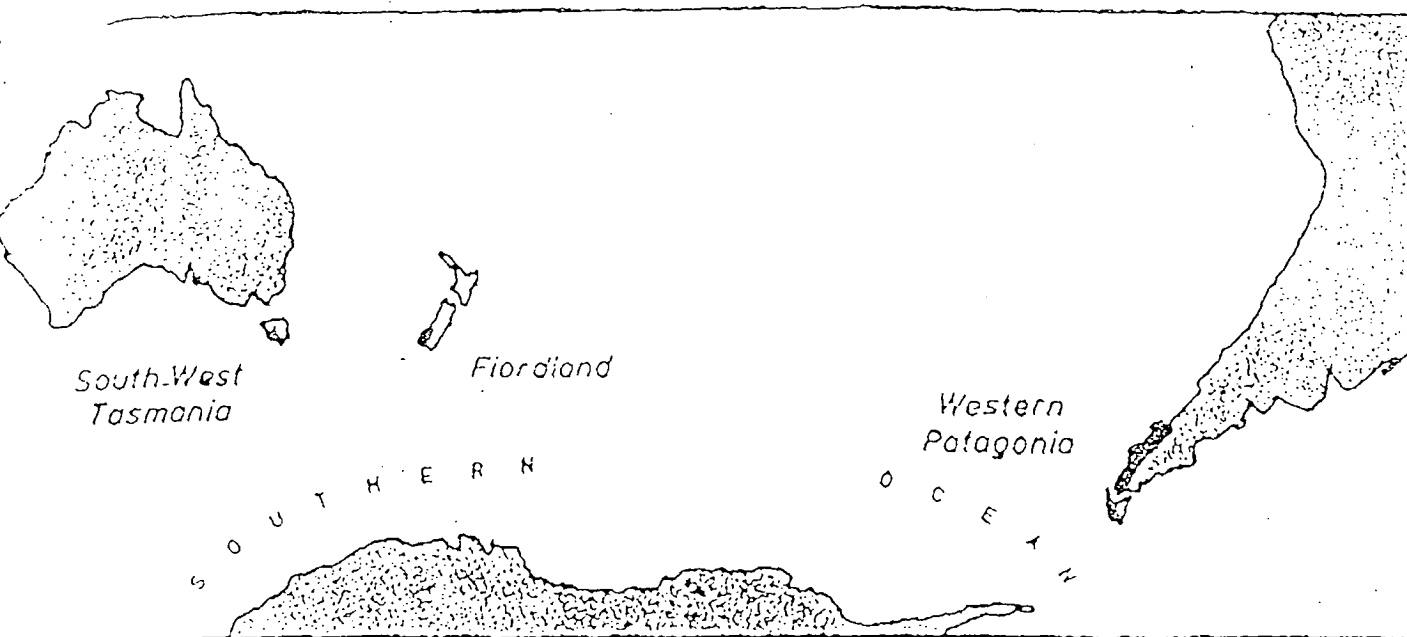
1. DOCUMENTATION

- i) IUCN Data Sheet (including reference list); original nomination of 1981.
- ii) Consultations: Commonwealth and Tasmania State Government officials; P. Hitchcock, J. Kirkpatrick, G. Mosely, R. Davidson (National Trust), ACTUCN, P. Toyne (ACF), A. Graham (TWS), G. Stankey, M. Chilcott, H. Eidsvik.
- iii) Additional literature consulted: Australian Heritage Commission 1987 "World Heritage Value of the Southern Forests and Other Areas Associated with the Existing World Heritage Area"; D. Neilson 1982. "Southern Trilogy", *Wilderness* 18, December
- iv) Site Visits: Jim Thorsell. January 1987 and February 1989

2. COMPARISON WITH OTHER AREAS

As with any island, Tasmania has special natural qualities found nowhere else. In the Tasmanian wilderness these qualities are a mix of biophysical and cultural values set in a nature-dominant landscape of high value for science and conservation. Within Tasmania it is certainly unique as there is no other part of the island with the same concentration of natural features and wild landscape. The size of the nominated area is approximately 10% of the area of the island and is one of the five largest conservation units in Australia. It has a number of species affinities with the eastern sclerophyll and eastern grassland biogeographic provinces of mainland Australia but, because of its special character, it is given its own separate province. Its glacial history and scenic aspects have many similarities with the "Australian Alps" but those found in the Tasmanian Wilderness are of greater variety and are more pronounced and spectacular. Although pockets of real temperate rainforest occur on the mainland, the nominated site contains the largest and most pristine tracts in all Australia. There is thus no other area in Australia with a similar combination of values relating to dramatic scenery, extensive coastal habitat, karst landscape, glacial features, wild rivers, lakes, alpine vegetation, tall temperate rainforest and almost 30 endemic wildlife species.

On a global scale the Tasmanian Wilderness can be best compared with two other areas of temperate wildlands that occur between the 40th and 50th parallels in the Southern Ocean. These are the parks of Fiordland in New Zealand where a new nomination for a much expanded area is in progress and Los Glaciares in Argentina to which the adjacent contiguous parks in Chile may also eventually be added. All three of these areas are rugged glaciated mountainous regions situated in the path of strong westerly, moisture-laden winds. All three have national parks on the World Heritage list whose areal extent are being enlarged. The affinities between these widely-separated sites are reflected in the strong floristic links which originated with the existence of the southern super-continent of Gondwanaland. Before the continents began to drift apart, a number of plants had begun their evolution and a striking example of a genus now common to these widely separated areas is the southern beech, *Nothofagus*. The Tasmanian Wilderness can be thus viewed as one part of a "trilogy" of three large natural World Heritage sites, each unique in many ways but united in evolutionary history by the genus *Nothofagus*.



2. INTEGRITY

The current nomination is a reformulation of the original site inscribed in 1982 which was 769,355 ha in size. The new proposal adds an additional 261,960 ha bringing the total size of the property to 1,031,315 ha which represents a 34% increase. The areas added correspond to the recommendation of IUCN in the 1983 evaluation except for the Denison River/Prince of Wales Range/Spires Range which remains in the enclave referred to as the "hole in the donut". These new additions compliment the existing site (1) by increasing the extent of protection of the essential wilderness quality; (2) by adding on the eastern boundary an extensive area of undisturbed tall open forest dominated by eucalypts (thus expanding the representativeness of a wide range of species including the Myrtaceae and the Epacridaceae, two of Australia's endemic families, as well as adding significant stands of southern conifers); (3) by adding the adjacent Walls of Jerusalem and a portion of the Central Plateau area (a very interesting and scenic glacial area with hundreds of rock basin lakes); and (4) by including a range of karst features and caves, many of which have evidence of early human occupation. All of these features are exceptional in their own right and greatly add to the overall natural value, wilderness quality and integrity of the site.

Further to the extension in size, there have been a number of other advances in management of the site over the past seven years. These include: (1) contributions from the Commonwealth of over A\$2 million a year to assist the State in strengthening management. These funds have assisted in improving access trails, conducting research, building a visitor centre and preparing management plans for certain components; (2) the establishment of advisory committees to provide advice on management issues; (3) institution of special regulations to control erosion damage by boat traffic on the Gordon River; and, most dramatically, (4) the cancellation of plans to proceed with the Gordon River hydro-electric power scheme. All of these activities represent positive actions to ensure that the high standards of management of World Heritage properties in Australia are maintained.

In terms of management arrangements, the State and Commonwealth have confirmed that the land declared as State Forest in the proposed World Heritage Area will be proclaimed State Reserve. Consequently, direct administration and day-to-day

management of the Tasmanian Wilderness will be by the Tasmanian Department of Lands, Parks and Wildlife, as is the case with the existing site. Other mechanisms in place now will also be extended to cover the new area. These include provisions for a Ministerial Council, a Standing Committee of Officials, and a Consultative Committee with representatives of voluntary community groups. The management of the site is thus unified under one agency which is complemented by an overlay of intergovernmental and public advisory and coordinating committees.

Outside the boundaries of the site, extractive forestry operations will approach the perimeter in many places along the eastern boundary and will certainly impact on World Heritage values. In addition to clear-cutting techniques, the threats are from road-building activity, fire escape and reduction in visual quality and wilderness values. These will hopefully be minimised through careful management and through application of the Forestry Commission's "Forest Practices Code". Conflicts with logging could be further reduced by adjustments to the eastern boundary of the site which does not follow natural features as is evident from its complex convoluted design. A total of nine specific suggestions for adjustment of the eastern boundary were reviewed during the IUCN field inspection and all of them, if included, would certainly add further old-growth forest, contribute to integrity, and simplify management (specifically these were Beech Creek/Counsel River, Wylds Craig, Gordon and Tiger Range, Upper Florentine, Upper Styx, Middle Weld, Middle Huon, Picton Valley and Southeast Cape).

Other suggestions were made as to the possibility of inclusion of more of the Central Plateau area and an area to the west which has not been given much attention to date. The major omission, however, is clearly the Denison/Spires/Maxwell River area comprising the northern and western portion of the "hole in the donut". This area has been proposed as a new national park but its exclusion very clearly remains as a major anomaly in the new nomination. The special values of the "hole in the donut" north-west of the Gordon impoundment are well documented. IUCN repeats its concern from 1982 that this area eventually becomes part of the Wild Rivers National Park and be incorporated into the nomination.

Related to the "hole in the donut" question is the obvious need to accept that the Lake Gordon impoundment is such a major intrusion that it should clearly be left out of the World Heritage site. Lake Pedder's impoundment is already in the site and this may appear as inconsistent with the exclusion of Lake Gordon. However the Pedder impoundment is not subject to as large a drawdown as Lake Gordon and is not as desolate in appearance. From a management perspective it is also advantageous to have Pedder within the site and some have even suggested that its long term restoration as a natural lake should be considered.

The conclusions on the boundaries of the new property therefore, are: (1) it is an immense improvement over the original; (2) there are, from a World Heritage values perspective, still some important sites omitted; and (3) that negotiations on final boundary delimitation are still in progress (eg a decision to add several small islands off the south-west coast in the proposed World Heritage Area has been made since the nomination was submitted). IUCN recognises the great amount of work and debate that has gone into the selection of these boundaries and that the outcome is the agreed compromise between the two governments involved. Rather than extend the boundary question into a "Stage III" situation, it would be preferable to continue negotiations with the objective of finalising details of the extent of the property before the Committee makes its final decision in December.

A final point affecting integrity pertains to small-scale mining operations that exist at several locations (Oakleigh Creek, Adamsfield, Melaleuca and Jane River). They are all very marginal in nature and it is extremely unlikely that major deposits will be found. Their existence, however, along with the access to them, are inimical to the wilderness values of the site. It is hoped that their operations will gradually be phased out and restoration undertaken of the disturbed areas.

4. ADDITIONAL COMMENTS

Several secondary management issues are associated with the site but are not discussed in this evaluation as they are not considered as issues of concern to the Committee. These deal with the future of an area of land revoked from the Wild Rivers National Park in 1982, the operation of a limestone quarry near Exit Cave, and changes in the limnology of the meromictic lakes. It is also evident that the mix of land designations within the site may be excessive and that future administrations may wish to consolidate these.

It is also noted that the name of the site is being adjusted to the "Tasmanian Wilderness". It should be recognised, however, that not all the area in the site is wilderness and that there is other wilderness on the island (see Map 6 of the nomination).

5. EVALUATION

In 1982 the Committee inscribed the site on the basis of it meeting all four natural, plus cultural, criteria. The addition of 262,000 ha to the site further adds to its values by including ecosystems (particularly tall eucalypt forest), and land system types (glacial landforms and karst) lacking in the original area. The new proposed boundary improves the integrity of the original area, including a substantial portion of the range of many rare species, and increases the extent of wilderness reservation. Along with the addition of these important values, the State and Commonwealth have cooperated to implement a more effective management regime.

IUCN's main concern relates to the boundaries which, as noted above, could be adjusted to incorporate some obvious missing elements. As final delimitation of boundaries is still in progress, this concern will hopefully be lessened in time for the final report to the Committee.

6. RECOMMENDATION

The boundaries of the property inscribed in 1982 as the "Western Tasmania Wilderness National Parks" have been substantially modified and consolidated in a revised area now known as the "Tasmanian Wilderness". This site should be inscribed on the World Heritage list on the basis of satisfying all four criteria for natural properties. A final decision on the exact size of the property (particularly the status of the "hole in the donut" area) should be

ENDS

APPENDIX – CHAPTER 6

AGENDA ITEM 3 - MINISTERIAL COUNCIL

TERMS OF REFERENCE

Council accepted the following Terms of Reference :

1. The Ministerial Council will be responsible for
 - a) co-ordinating policy between the Commonwealth and Tasmanian Governments on matters concerning the World Heritage area, and
 - b) providing advice and making recommendations to both Governments in relation to
 - i) management plans for the World Heritage area
 - ii) management requirements
 - iii) annual and forward year programmes of expenditure for capital and recurrent costs of managing the World Heritage Area and the development of appropriate infrastructure, accommodation and facilities, and
 - iv) Scientific studies in relation to matters of natural or cultural significance.
2. The Ministerial Council will provide a report to both Governments in sufficient time that its recommendations and advice might properly be considered in a budgetary context by each Government for the following financial year.
3. The Ministerial Council may refer such matters as it sees fit, consistent with the matters outlined in Terms of Reference 1., the Tasmanian World Heritage Area Council Standing Committee of officials or the TWHAC Consultative Committee for advice.

GUIDELINES FOR OPERATION

1. Frequency of Meetings

Council agreed to accept the Standing Committee's recommendation that the Council meet once a year and at other times as convened by the Chairman. It was considered that in the early stages there could probably be a need to meet at least twice a year.

Council also agreed that meetings should be held in Tasmania.

2. Preparation of Business Papers

Council noted that Tasmania will provide the Secretariat function for the Council.

3. Summary Record

Council agreed to the preparation of summary record of proceedings, to be circulated to the Commonwealth for agreement.

Mr Cohen suggested that the Summary records of meetings be tabled in Parliament.

Council discussed the position of papers and reports of the proceedings of the Ministerial Council, Standing Committee and Consultative Committee in respect of requests for copies of those documents and records under the Commonwealth Freedom of Information (FOI) Act.

Council agreed that the Standing Committee should identify those documents which should be subject to the FOI legislation and then suggest a mechanism for consultation to be agreed to by Council. It was also agreed that the question of tabling be further discussed when the FOI position became clear.

AGENDA ITEM 4 – STANDING COMMITTEE

TERMS OF REFERENCE

Council agreed to the following Terms of Reference for the Standing Committee :

1. The Standing Committee is responsible to the Tasmanian World Heritage Area Council and will :
 - a) provide advice to Council in all matters relating to the World Heritage Area, including policies, programmes and funding;
 - b) oversee the preparation of management plans for the World Heritage Area;
 - c) oversee the administration and management of the World Heritage Area, including the implementation of agreed policies;
 - d) provide advice to Council on interim management of the World Heritage Area; and
 - e) provide advice to Council on scientific studies in relation to matters of natural or cultural significance.
2. The Standing Committee may refer such matters as it sees fit, consistent with the matters contained in Terms of Reference 1., to the TWHAC Consultative Committee for advice.

AGENDA ITEM 5 – CONSULTATIVE COMMITTEE

TERMS OF REFERENCE

Council agreed to the following Terms of Reference for the Consultative Committee :

The Consultative Committee will provide advice to the Ministerial Council and the Standing Committee on matters relating to the development and management of the World Heritage Area either of its own motion or in response to requests from either the Tasmanian World Heritage Area Council or the TWHAC Standing Committee.

APPOINTMENT OF CHAIRMAN

Council agreed that the Chairman of the Consultative Committee should be a Tasmanian and a person not connected with the South-West debate.

The Premier suggested Mr Doug Doyle, former Director-General of Lands, for the position of Chairman and Mr Cohen agreed to consider the suggestion and respond quickly.

MEMBERSHIP

Council agreed that the general composition of the Consultative Committee, in terms of the general interest areas to be represented, would be as follows :

Tasmanian Nominations : Tourism, Department of the Environment, Local Government, Tasmanian National Parks and Wildlife Service, Development Interests, Scientific Community, Conservation Groups.

Commonwealth Nominations : Conservation Groups, Australian National Parks and Wildlife Service, Scientific Community, Recreation and Independents.

Council agreed that the Committee should consist mainly of Tasmanians and that members should be appointed in their own right and not as representatives of a particular organisation.

It was also agreed that once each Government had decided on a list of names for its nominations, those lists would be exchanged to provide each government an opportunity to comment on the other's nominations.

GUIDELINES FOR OPERATION

1. Appointments and Terminations

Council agreed to the following :

- a) appointments and terminations to be made jointly by the Chairman of the Ministerial Council and the Commonwealth Minister for Arts, Heritage and Environment.
- b) to refer the question of grounds for termination of appointments to the Standing Committee.

2. Tenure of Appointments

Council agreed that initially, appointments would be made for 2 years.

3. Servicing

Council agreed that the Consultative Committee should be serviced by the Tasmanian National Parks and Wildlife Service.

4. Costs

Council agreed that the Commonwealth would meet the cost of servicing the Committee and that the Standing Committee should formulate a costs programme.

5. Frequency of Meetings

Council agreed that the Consultative Committee should meet as often as necessary for the performance of its functions, with at least one meeting in each financial year.

6. Report

Council agreed that a report of each meeting be forwarded by the Chairman of the Committee to the Chairman of the Council within 21 days of the meeting.

7. Decision Making

Council agreed that the Consultative Committee should determine its own procedures for decision making.

REMUNERATION

Council agreed that Commonwealth rates of payment and allowances appropriate to Category 2 be adopted for the Chairman and Members.

APPENDIX – CHAPTER 7

'A 490 DAY DIARY'

A CHRONOLOGICAL REVIEW OF THE MONTHS PRECEDING AND FOLLOWING THE SIGNING OF THE TASMANIAN PARLIAMENTARY ACCORD

18 APRIL 1989 – The then Premier, Robin Gray, and Leader of the Liberal State Government, announces an election to be held on 13 May 1989.

13 MAY 1989 – Election, Liberals 17 seats, 46% of vote; ALP (Labor) 13 seats, 35% of vote; Green Independents, 5 seats, 17% of vote. Liberal Government remains in power as a minority government.

23 MAY 1989 – Poll declared. Neither Robin Gray (Liberal Party) or Labor Leader, Michael Field, had outright majority to govern. Mr Gray calls on the Governor, General Sir Phillip Bennett, to commission him as Premier. The Governor accepts his advice and commissions him as Premier. Mr Field provides the Governor with a copy of the first draft of the Tasmanian Parliamentary Accord. The Governor seeks advice from the Premier (Gray) who states the Accord document does not affect his ability to govern. The Governor advises Mr Field of this advice.

1 JUNE 1989 – Robin Gray and Liberal Party members sworn in as minority government. Labor/Green Accord was officially signed by all Green Independents and Michael Field on behalf of the Labor Party.

28 JUNE 1989 – Parliament resumes. No confidence motion is moved against Robin Gray and the State Government.

29 JUNE 1989 – After all night debate, no confidence motion is passed at 6.30am. Governor reviews Accord individually with Michael Field and five Green Independents and gives Michael Field commission to govern as Premier shortly after Robin Gray resigned his commission as Premier. The Green/Labor Accord is in place.

19 JULY 1989 – Dispute between the Labor Party and Green Independents over Government backing for Huon Forest Products alternative mill site at Karanja in Derwent Valley. Development stopped by the Government at request of the greens as set out in the Accord. Compensation package for Huon Forest Products prepared.

12 AUGUST 1989 – Green Independents propose big hikes on bulk power users and forestry companies. Proposal not part of the Accord and not accepted by the Labor Government.

29 AUGUST 1989 – Labor initiates process for industry, farmers, unions and the conservation lobby to come to agreement on the forest dispute – known as the "Salamanca Agreement".

30 AUGUST 1989 – Green Independents push for another World Heritage nomination pursuant to the Accord. Liberal Opposition no confidence motion in Labor minority Government relating to lack of business confidence fails.

31 AUGUST 1989 – The Salamanca Agreement is signed by unions, forest industry groups, farming interests, and conservation groups. Negotiations commence on the Forests and Forest Industry Strategy – to conclude over one year later.

7 SEPTEMBER 1989 – Dr Brown, on behalf of the Green Independents, accuses Labor of breaching the Accord over the World Heritage provisions of the Accord.

27 SEPTEMBER 1989 – Green Independents disown the minority Labor Government/Michael Field's first Budget. "This is a Labor Budget alone, not a Labor/Green Budget", Dr Bates said.

6 OCTOBER 1989 – Greens call for public disclosure of power contracts with major industry users. Labor pushes ahead with increase. Christine Milne uses her first formal speech to Parliament to blast Labor for disregarding the Accord. "You are in Government because your leader signed this Accord", Mrs Milne tells Labor.

12 OCTOBER 1989 – Dr Brown and Forest Minister David Llewellyn have their first major row over plans to increase the woodchip quota.

19 OCTOBER 1989 – Greens join Opposition in attack over Government lease approval to mine the Friendly Beaches on Tasmania's East Coast.

31 OCTOBER 1989 – Labor Party State Secretary Eugene Alexander admits that Labor's ultimate aim is to eliminate the Greens. Greens say that's okay if Labor implements their policies.

9 NOVEMBER 1989 – Forests Minister David Llewellyn says woodchip export quotas could be reviewed as part of the Forests and Forest Industry Strategy talks despite clause 9 of the Accord.

13 NOVEMBER 1989 – Greens reject Federal Government guidelines for a chlorine bleaching kraft mill, but agree to State feasibility study on all options including unbleached alternatives.

23 NOVEMBER 1989 – Government and Opposition defeat Greens on December shop trading extensions for major stores.

1 DECEMBER 1989 – Greens join Opposition to hold up a tobacco tax bill.

7 DECEMBER 1989 – Greens combine with Opposition to defeat Government school closure legislation.

16 DECEMBER 1989 – Michael Field warns Greens he may call an election if they continue to defeat his Government on major legislation, as they did on school closures. "I'm not here to serve time and tread water", Mr Field said.

2 FEBRUARY 1990 – Green MHA Lance Armstrong survives challenge to his seat for selling copies of his book to school libraries.

8 FEBRUARY 1990 – Government bypasses Parliament after Greens say they will oppose petrol rostering abolition.

16 FEBRUARY 1990 – Christine Milne accuses Government Ministers of "shafting" the Greens to wreck the Accord.

20 FEBRUARY 1990 – Greens submit \$172 million tax plan on resource companies and bulk power users.

7 MARCH 1990 – Greens hold their own summit and admit internal problems.

13 MARCH 1990 – Green lobby activist, Geoff Law (and UTG candidate for Federal Parliament seat in the House of Representatives in 1990) calls for draining of Lake Pedder. Labor and Liberal Party respond saying it would be madness and estimate a cost of \$26 million to supply equivalent amount of power from oil each year.

24 MARCH 1990 – Greens fail in bid to have a Green Senator elected to Federal Parliament.

10 APRIL 1990 – Greens pledge support for Education Minister Peter Patmore despite proposed \$20 million department cut. Greens back down on their promise to have the department budget increased by \$20 million.

7 APRIL 1990 – Accord partners revamp Accord arrangement, giving Greens greater input and meetings with full Caucus.

14 APRIL 1990 – Government to push ahead with extended trading hours on Saturdays. Greens split, with Dr Bates supporting Government.

20 APRIL 1990 – Greens signal moves to form their own political party.

15 MAY 1990 – Five Greens and Wilderness Society write to Michael Field accusing Government of undermining Greens authority in Forest Industry Strategy talks.

16 MAY 1990 – Michael Field rules out any more World Heritage listings for three years unless there is broad community support.

1 JUNE 1990 – Draft Forest Strategy released. All parties, including Combined Environment Groups, sign strategy.

9 JUNE 1990 – Greens call on Government to get on with reforms and start making decisions.

20 JUNE 1990 – Cresap review on education announced.

29 JUNE 1990 – Accord's first anniversary, and Greens accuse Government of continuing the Liberals' debt problems by borrowing to pay redundancies.

2 AUGUST 1990 – Michael Field says he will accept findings of Cresap's interim report. Greens angry about education cuts.

15 AUGUST 1990 – Greens and Education Minister Peter Patmore find common ground on overhaul of education budget.

26 AUGUST 1990 – Greens threaten to axe Accord if relationship doesn't improve.

22 AUGUST 1990 – Greens warn they may censure Mr Patmore over Education cuts, but join Government to defeat an Opposition censure of Mr Patmore.

11 SEPTEMBER 1990 – Conservation groups call for a 10-week extension on forest industry strategy negotiations, which is denied.

14 SEPTEMBER 1990 – Combined Environment Groups refuse to sign strategy document on grounds they were not allowed full input.

16 SEPTEMBER 1990 – Conservation groups produce their own strategy. The cost to prepare the Strategy queried by the Liberal Party opposition – who funded the production of the new Strategy – taxpayers or not?

19 SEPTEMBER 1990 – Gerry Bates warns that Accord breach on export woodchip quotas would mean end to the Accord.

28 SEPTEMBER 1990 – Private talks between Accord partners on forestry collapse.

1 OCTOBER 1990 – Cabinet endorses Forests and Forest Industry Strategy, including increasing woodchip quotas. Greens announce end of the Accord.

OCTOBER ONWARDS – Labor Party exists as minority government with support of the Green Independents. Most of the provisions of the Accord already met – the Green Independents therefore achieve most of their stated agenda while the Labor Party retains government. The Liberal party remains in opposition.¹

¹ Sourced from The Mercury, other Tasmanian daily newspapers and author's research and personal experience.

**SUMMARY OF CONSTITUTIONAL EVENTS INVOLVING
HIS EXCELLENCY THE GOVERNOR OF TASMANIA CONCERNING
THE DISSOLUTION OF THE HOUSE OF ASSEMBLY ON 18 APRIL 1989
AND THE SUBSEQUENT GENERAL ELECTION ON 13 MAY 1989**

18 APRIL 1989

- . The Premier of Tasmania advised His Excellency the Governor to prorogue Parliament, dissolve the House of Assembly and to issue writs for a General Election on Saturday, 13 May 1989.
- . The Governor, by Proclamation, prorogued Parliament until 29 June and dissolved the House of Assembly.

29 MAY 1989

- . The result of the Election was officially declared.
- . The Governor received a letter from the Leader of the Opposition proposing that His Excellency not allow the Liberal Government to continue in Office and that he commission a Labor Minority Government based on an alliance with five Independent members.
- . The letter was referred by the Governor to the Premier.
- . (5.00pm) The Premier called on the Governor and tendered advice that, as no formal coalition arrangement was in place, his Commission as Premier should continue and that as his Party had the majority of seats in the House of Assembly, the Government should remain in Office as a Minority Government.
- . The Governor accepted this advice.
- . (7.00pm) A copy of a "Tasmanian Parliamentary Accord", signed by the Leader of the Opposition and a Member for Denison (Dr Brown), was delivered to the Official Secretary at Government House by the Leader of the Opposition.
- . The document was referred by the Governor to the Premier.

30 MAY 1989

- . The Premier advised the Governor that the Accord was deficient in a number of important procedural and policy areas and did not influence the capacity of his Minority Government to continue in Office.
- . The Governor accepted this advice.

1 JUNE 1989

- . On the advice of the Premier, the Governor appointed a new Ministry and swore Ministers into Office. The Premier's Commission remained in force.

13 JUNE 1989

- . On the advice of the Premier, the Governor proclaimed that Parliament would recommence on 28 June.

14 JUNE 1989

- . The Proclamation was published in the Tasmanian Government Gazette.

22 JUNE 1989

As a result of concerns expressed by the Attorney-General, the Governor sought clarification from the Premier on the provision of essential independent legal advice to the Governor.

23 JUNE 1989

The Premier confirmed that in accordance with constitutional convention and the independent authority of the Office, the Solicitor-General was the principal independent legal adviser to the Governor.

27 JUNE 1989

(5.00pm) The Leader of the Opposition forwarded to the Governor a copy of a more detailed Tasmanian Parliamentary Accord co-signed by all parties to the Agreement.

The Governor immediately sought the advice of the Premier.

(5.30pm) The Premier called on the Governor and, in responding to the Tasmanian Parliamentary Accord, advised that the Government had sought a number of legal opinions on the constitutional alternatives available to the Governor. The Premier stated that these opinions supported advice that the House of Assembly be dissolved and that such advice would be within the proper limits of constitutional convention. The Governor indicated that, subject to developments when the House met, he was unlikely to accept such advice, if given.

The Premier advised the Governor that the legal opinions obtained would be forwarded for his Excellency's perusal.

28 JUNE 1989

(11.00am) Parliament was opened by Commissioners.

(12.30pm) Following his election, the Speaker presented himself to the Governor.

(3.00pm) The Governor performed the Ceremonial Opening of the Forty-First Parliament.

(4.15pm) The House of Assembly sat for the despatch of business.

29 JUNE 1989

(9.00am) The Speaker and representative Members of the House of Assembly were received by the Governor at Government House. The Address-in-Reply was presented.

(1.30pm) The Governor summoned the Premier and secured his agreement that His Excellency explore the capacity of the Leader of the Opposition to form a Minority Government capable of providing stability for a reasonable period.

(2.30pm) The Governor summoned the Leader of the Opposition who assured His Excellency that a Minority Labor Government would be supported by all five Independent Members.

The Governor, in a letter handed to the Leader of the Opposition, sought written assurances from the Leader and each of the five Independents of five

major issues which had the potential to seriously affect the undertaking given to provide stable Government for a reasonable period of time.

(5.00pm) The Leader of the Opposition returned to Government House and submitted to the Governor a document signed by himself and the five Independents which addressed the concerns outlined in writing by the Governor.

The Governor advised the Leader of the Opposition that he intended to consult separately with each of the five Independents and then discuss the outcome with the Premier.

(5.30pm) The Governor summoned each of the Independent Members of the House of Assembly in turn to establish their intentions in regard to supporting a Minority Labor Government for a reasonable period. The Governor accepted the more detailed explanations given as to their firm commitment to support a Minority Government.

(6.30pm) The Governor informed the Premier of the results of his discussions with the Leader of the Opposition and the five Independents and asked the Premier for his further formal advice as soon as practicable.

(7.15pm) The Premier called on the Governor and formally tendered his resignation as Premier, and that of his Ministry, and advised the Governor to call on the Leader of the Opposition to form a Government.

(8.00pm) The Governor summoned the Leader of the Opposition, commissioned him as Premier and swore him into Office.

3 JULY 1989

The Governor, on the advice of the Premier, appointed the new Ministry and swore the Ministers into Office.

THE OFFICIAL STORY

DOCUMENTS RELEASED AND TABLED IN STATE PARLIAMENT IN 1989 BY THE GOVERNOR, GENERAL SIR PHILLIP BENNETT, AC, KBE, DSO, FOR THE PUBLIC RECORD

. Letter from the Governor to the Leader of the Opposition (Mr Field) dated 29 June seeking assurances on the capacity for a stable Government for a reasonable period of time.

. The reply from the Leader of the Opposition.

. Letter from the Premier (Mr Gray) formally resigning and advising the Governor to commission Mr Field to form a Government.

. The Governor's letter of acceptance of resignation of the Premier (Mr Gray).

. Letter from the Governor to Mr Field instructing him to proceed to form a Government.

GOVERNMENT HOUSE TASMANIA

29 June 1989

The Honourable Michael Field, MHA
Leader of the Opposition
Parliament House
HOBART TAS 7000

Dear Mr Field

Following the defeat of the Government on the floor of the House of Assembly earlier today, I wish to explore your capacity to form an alternative administration.

You have assured me that, with the support of all five Independent Members of the Assembly, you can form a Minority Government.

The Labor-Independents agreement - referred to as the Accord - provides the basis for your assurance that you can form a Minority Government. While in no way casting doubt upon the sincerity of that assurance, I am bound to satisfy myself that neither side is under a misapprehension about the other which throws into doubt your capacity to govern. Accordingly, I seek your assurances on five aspects of this agreement which have the potential to provide instability.

They are :-

- . That the Accord is binding in that it will be adhered to by all the signatories.
- . That the full copy of the Tasmanian Parliamentary Accord which you submitted to me on 29 May is signed only by you and one Independent Member.
- . Individual Independent Members preserve their right to move a no-confidence motion of their own against a Labor Minority Government, and thereby restrict the capacity of that Government to legislate.
- . The Accord sets out consensus in some areas but does not constitute comprehensive agreement on policy.
- . The Accord contains the major issue of a fixed four year Parliamentary term. This is a significant constitutional issue, which may not appear to have been fully canvassed in the Election campaign.

I therefore seek assurance with regard to the formula agreed between yourself and each of the five Independent Members for addressing these issues. This may satisfy me that there exists, in fact, an agreed and adequate basis for Government for a reasonable period of time.

Yours sincerely

P H BENNETT
GOVERNOR

HOUSE OF ASSEMBLY

29 June 1989

His Excellency General Sir Phillip Bennett, AC, KBE, DSO
Governor of Tasmania
Government House
HOBART 7000

Your Excellency

You wrote to me on 29 June 1989 seeking assurances on five aspects of the Labor-Independents Parliamentary Accord. I will deal with these in turn.

1. I enclose a copy of the Accord signed by myself as Leader of the Parliamentary Labor Party, and by each of the five Green Independent Members. Each of the signatories is bound by and will adhere to the Accord.
2. Although the full copy of the Tasmanian Parliamentary Accord which I submitted to you on 29 May 1989 was signed only by myself and Dr Brown, the enclosed copy signed by each of the Green Independent Members confirms that the Parliamentary Accord is regarded by all concerned as binding.
3. Under the Parliamentary Accord, the five Green Independent Members undertook that they would:-
 - i support the Budget and Supply bills of my government;
 - ii neither support nor abstain from any Opposition motion of no confidence;
 - iii attend all Parliamentary sittings and be present for all votes and divisions, except where pairs are granted.

In addition, by their unanimous support for the successive votes in the House expressing no confidence in Mr Gray and confidence in myself, the five Green Independents have affirmed that I have "and will continue to have" the confidence of the House. They have further authorised me to indicate to you that none of them will move any motion of no confidence in my Government, unless some issue of gross impropriety, corruption or grave maladministration were to arise which could not be resolved by negotiation between the Members of the Accord.

4. The Accord does cover substantial areas of government policy, in relation to some of which there were potential differences of policy which were able to be resolved during the negotiations leading to the Accord. The parties to the Accord will seek to resolve any differences which may arise by consultation and negotiation, having regard to the spirit of the Accord and to the Green Independents' undertaking of support in principle for my Government. Because the Green Independents are not, and consistently with the pledges given by the Labor Party and the Green Independents before the election could not be, associated in a formal coalition, the Green Independents retain

the right to move their own legislation (which the Labor Party may support, oppose or seek to amend as the case might be), or to move amendments to Government Bills on points of detail, and in the last resort to oppose particular pieces of Government legislation if the processes of consultation and negotiation have failed to achieve a satisfactory consensus. We do not, however, envisage that this will arise with any frequency, having regard to the provisions of the Accord relating to consultation (see para 1 of the Heads of Agreement). It should be stressed that the Accord could not provide comprehensively for policy issues which might arise in the future, but the procedures for consultation in the Accord will of course extend to such issues.

5. As to the four year term, I enclose a copy of the ALP Policy Document, Government for the People. The reference to the four year term is at page three. The concern of my party, which is shared by the Green Independents, is to restrict the right of a Premier to call an early election merely for party political gain. It is not intended to restrict the residual prerogative of the Crown to grant a dissolution in a case where Parliament has for whatever reason become unworkable. I also enclose a copy of the Victorian Act which provides for a minimum three year term in normal circumstances. You will note that under section 4(3), an earlier election is possible in specified circumstances, including a vote of no confidence in the Government. The precise terms of the proposed Tasmanian legislation have not yet been worked out, but we would envisage legislation which preserves a reasonable degree of flexibility while avoiding the present abuse of the power to recommend dissolution for short-term political purposes. There will of course be full community consultation and discussion of the proposal.

Yours sincerely

MICHAEL FIELD, MHA
PARLIAMENTARY LEADER OF THE LABOR PARTY

PREMIER OF TASMANIA

29 June 1989

His Excellency, General Sir Phillip Bennett, AC, KBE, DSO
Governor of Tasmania
Government House
HOBART 7000

Your Excellency

Following the no confidence motion carried in the House of Assembly this morning, I hereby tender the resignation of my commission as Premier and recommend to you that you call upon the Leader of the Opposition, Mr Field, to form a Government.

My resignation carries with it, of course, the resignation of the entire Ministry.

In submitting my resignation, I would like to say two things.

The first is how much I and the Members of my Cabinet have appreciated your wise counsel since you assumed the Office of Governor in 1987. It means a great deal to a Premier to have a Governor of complete impartiality and integrity, and I wanted you to know how much I have valued this.

I would also like to thank you and Lady Bennett, both personally and on behalf of the people of Tasmania, for the dedication and enthusiasm with which you are carrying out your role.

Second, I would like to say how deeply I value the honour of having been Premier of Tasmania for the past seven years. There is no greater privilege than to serve people and in saying this I know I speak for my Ministers as well as myself.

Again, my warm thanks for all your courtesy over the past two years.

Yours sincerely

ROBIN GRAY
PREMIER

GOVERNMENT HOUSE TASMANIA

29 June 1989

The Honourable R.T. Gray, MHA
Parliament House
HOBART TAS 7000

Dear Premier

I acknowledge your letter in which you formally tender your resignation as Premier together with that of the entire Ministry with immediate effect. I accept your resignation.

Having on your advice, consulted with the Leader of the Opposition, I have now accepted his assurances that it is possible for him to form a Minority Government with the support of the five Independents. Accordingly, I will swear him as Premier and, on his advice, will appoint a new Ministry as soon as possible.

Yours sincerely

P H BENNETT
GOVERNOR

GOVERNMENT HOUSE TASMANIA

29 June 1989

The Honourable M Field, MHA
Parliament House
HOBART TAS

Dear Mr Field

You have assured me that you have the capacity to command a Majority in the House of Assembly and have given me the assurances which I sought from you and each of the Independent Members on five matters of concern relating to the stability of Government.

Accordingly, I advise that I intend to commission you as Premier of Tasmania and instruct you to proceed to form a Government. I do this on the understanding that you, your party and the Independents will comply with the assurances to which I have referred.

I await your advice as to the Ministry you will recommend for swearing in on Monday next.

Yours sincerely

GENERAL SIR PHILLIP BENNETT, AC, KBE, DSO
GOVERNOR OF TASMANIA

Gross Forested Areas, Volumes and Values for the Municipalities of
DELORAINÉ, KENTISH, LATROBE and LONGFORD

Reserved Areas

Municipality	Gross Area(ha)	Sawlog Volume(m3)	Sawlog Value(\$)	Pulpwood Volume(m3)	Pulpwood Value(\$)	Combined Value(\$)
Delorainé	45,929	551,924	82,788,600	5,127,926	384,594,450	467,383,050
Kentish	5,373	74,776	11,216,400	624,240	46,818,000	58,034,400
Latrobe	2,280	14,019	2,102,850	137,352	10,301,400	12,404,250
Longford	1,713	18,292	2,743,800	185,542	13,915,650	16,659,450
Totals	55,295	659,011	98,851,650	6,075,060	455,629,500	554,481,150

Restricted Areas

Delorainé	23,223	375,229	56,284,350	3,278,792	245,909,400	302,193,750
Kentish	3,730	44,798	6,719,700	387,249	29,043,675	35,763,375
Latrobe						
Longford	3,714	44,627	6,694,050	544,978	40,873,350	47,567,400
Totals	30,667	464,654	69,698,100	4,211,019	315,826,425	385,524,525

\$1.00

THE GREEN / ALP ACCORD



29th MAY 1989

HISTORIC AGREEMENT BETWEEN FIVE INDEPENDENTS
(BOB BROWN, GERRY BATES, DIANNE HOLLISTER,
LANCE ARMSTRONG AND CHRISTINE MILNE) AND
THE AUSTRALIAN LABOR PARTY (TASMANIA)

- THE ACCORD IN FULL
- WHAT IT MEANS
- WHY IS IT NECESSARY
- FOREWORD BY BOB BROWN

324.2946

GRE

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Foreword

The week leading to the Green Independent/Labor Accord put all five Independents through a phenomenal test.

We had repeatedly said during the election campaign that we would not cause instability with a balance of power situation but would make an accommodation with either of the two major parties in the interests of Tasmania.

We have done that - helped by countless contacts, criticism and encouragement from people throughout the state.

The Accord does not put us in a coalition. We decided not to take cabinet posts (with their extra wages, white cars and so on).

Instead, with the Field Labor Government we have gained an unprecedented Accord and so gain access to and influence on the whole range of government decisions.

As you will see in the Accord, Tasmania gets a new degree of openness in democracy, including Freedom of Information. And we have at the outset a list of innovative social, economic and environmental reforms.

The Accord is well short of covering all issues. But it is the basis upon which we aspire to build a period of much improved government.

In keeping with our commitment, we did enter negotiations with Mr Gray's party. But then Mr Gray did an about turn on an agreement to resume those talks.

For us not to make a clear choice of supporting a party was indeed to make a choice. If we had simply sat on the cross benches, by default we would have let Mr Gray's government continue - with no innovation, no environmental guarantees and no new openness with the people.

He could have licensed the Huon Forest Products chip mill; set off logging in magnificent forests including the Douglas Apsley (now to become a national park in the Accord) and misdirected public money - like the \$20 million offer to Noranda-North Broken Hill for the Wesley Vale pulpmill.

The Accord is a document for optimism, opening exciting opportunities for the future.

The events leading to the Accord were trying, even harrowing. But we have nevertheless succeeded and The Independents have emerged even more strongly bonded in our vision for Tasmania.

We welcome your participation, advice and efforts in the weeks, months and years ahead.

Bob Brown
Independent Member for Denison

Telephone: (002) 30 2385
Telex: 58218
Facsimile: (002) 343206



HOUSE OF ASSEMBLY

Leader of the Opposition
Parliament House
Hobart 7000

29 May 1989

The Hon. R.T. Gray MHA
Premier
Executive Buildings
15 Murray Street
HOBART 7000

Dear Premier

The Parliamentary Labor Party and the five elected Independents have today reached a Parliamentary Accord which ensures the support of my party as an effective government.

A signed copy of the Accord will be forwarded to you in due course.

On behalf of the Parliamentary Labor Party

(Michael Field)
LEADER OF THE OPPOSITION

WE CONFIRM THAT AN ACCORD TO THIS EFFECT HAS BEEN REACHED

(Dr Bob Brown)
MEMBER FOR DENISON
(Dr Gerry Bates)
MEMBER FOR FRANKLIN
(Mrs Christine Milne)
MEMBER FOR LYONS
(Rev. Lance Armstrong)
MEMBER FOR BASS
(Mrs Di Hollister)
MEMBER FOR BRADDON

TASMANIAN PARLIAMENTARY ACCORD

An agreement between the Parliamentary Labor Party and The Green Independent members of Parliament.

Michael Field
(LEADER OF THE OPPOSITION)

Dr. Bob Brown
MEMBER FOR DENISON

Dr. Gerry Bates
MEMBER FOR FRANKLIN

Mrs. Christine Milne
MEMBER FOR LYONS

Rev. Lance Armstrong
MEMBER FOR BASS

Mrs Di Hollister
MEMBER FOR BRADDON

TASMANIAN PARLIAMENTARY ACCORD

An agreement between the Parliamentary Labor Party and The Green Independent members of Parliament to work together to -

- maintain stable government in Tasmania
- create a more open, community-responsive style of government
- enable individual members of both Houses of Parliament to play a greater role in the legislative process and development of government policy
- enhance the role of Parliament
- introduce much-needed social, economic, environmental and parliamentary reforms to Tasmania.

1. Stable Government

- a) Labor confirms that the introduction of fixed four-year parliamentary terms will be a priority in its first year in office.
- b) Green Independent members agree -
 - i) to support the Labor Government's Budget and Supply Bills
 - ii) not to support or abstain from any Opposition motion of no confidence
 - iii) to attend all parliamentary sittings and be present for all votes and divisions, except where pairs are granted.

2. Agenda for Reform

Labor confirms that its agenda for reform is as outlined in appendix 1.

3. Review of Accord

The PLP and the Green Independents agree to meet on a regular basis to review the implementation of the Tasmanian Parliamentary Accord.

HEADS OF AGREEMENT

1. Input by Green Independent members into Government
 - a) Green Independent members to nominate spokespersons in policy areas
 - b) minimum monthly meetings between relevant Green Independent spokespersons, ministers and appropriate public servants
 - c) Green Independent members to be given access to the State Service with formal interviews implemented through the Premier's Office
 - d) Cabinet and Green Independent members to meet on a regular basis to discuss general policy matters. Frequency of meetings to be by agreement
 - e) Green Independent members to be given the option of attending ministerial and similar conferences as observers
 - f) Green Independent members to be enabled to make policy submissions to ministers prior to any decision by cabinet. This may be achieved through cabinet committees
 - g) Green Independent members to be guaranteed pre-Cabinet consultation on legislation.
2. Parliamentary Reform
 - a) a total review of parliamentary procedures and standing orders to -
 - i) develop a more open parliamentary system
 - ii) enable individual members to have greater input into the legislative process
 - iii) to enable the Green Independents as a group to have the same rights as the Opposition in the House.
 - b) establishment of set sitting times along the Commonwealth model
 - c) advertising of parliamentary sitting times to encourage greater public attendance
 - d) the creation of new parliamentary committees including estimates committees

7.

- e) establishment of a register of pecuniary interests for parliamentarians and municipal councillors
- f) public disclosure of electoral gifts and donations to parties and individual candidates
- g) abolition of subsidised liquor to Ministers.

3. Departmental Appointments

- a) Green Independents to be consulted on appointments to selection panels for heads of departments
- b) Green Independents to be consulted if Cabinet is not going to accept recommendations of selection panel or if Cabinet is to make a direct appointment
- c) agreed mechanism to resolve a dispute would be that in the event of disagreement Green Independent spokesperson would consult with the minister prior to an appointment being made.

4. Legislative Research Service

- a) The legislative research service should be divided into three categories:
 - i) the economy
 - ii) ecological management
 - iii) social issues.
- b) Each category should have the equivalent of at least one full-time position. These experienced researchers will provide members with explanations, analysis and assessments of subject information and of policy and public issues as requested by members of the Opposition, crossbenches, Government backbenchers and Legislative Council.
- c) The researchers should be seconded from the bureaucracy for from one week to six months depending on the nature of requests. (The number of secondments will vary from time to time according to demand.)
- d) Secondment would give enterprising public servants the opportunity for first-hand experience with the parliament. Secondment would also reduce the budget allocation needed for this service.

8.

- e) To operate efficiently and effectively the team would require a manager-research co-ordinator and a secretary. The Green Independents should be consulted on the appointment of the manager-research co-ordinator. At least two other permanent research librarians must be provided for the use of all members (see Tasmanian Parliamentary Library Consultancy Report 1988).

5. Parliamentary Staffing

- a) Priority access to the Office of Parliamentary Counsel will be guaranteed for both the Opposition and Green Independents.
- b) Parity staffing with the Opposition will be provided to the Green Independents. Both Opposition and Green Independent members will be provided with adequate secretarial services in Burnie, Devonport, Launceston and Hobart as required.
- c) Facsimile machines and other appropriate resources will be made available to both Opposition and Green Independent members.

- 6. A Douglas Apsley National Park will be gazetted in 1989 with the boundaries defined by the Department of Lands, Parks and Wildlife by agreement with the Green Independents.

- 7. The Huon Forest Products venture will not be allowed to proceed.

- 8. The political mistakes of the Gray Government have ruled out Wesley Vale as the site for a future pulp mill. Therefore, there will be no new pulp mill at Wesley Vale.

- 9. The State export woodchip quota will not exceed 2.889 million tonnes per annum.

- 10. The Denison Spires area, Hartz Mountain National Park and Little Fisher Valley will be immediately added to the current World Heritage nomination. The Denison spires area and Little Fisher Valley will be gazetted as National Parks in 1989.

11. The following areas will be nominated immediately for World Heritage listing:

- Hartz Mountains National Park
- Little Fisher Valley

while the following areas will be considered for listing as a matter of priority:

- Central Plateau Protected Area and adjacent forest reserves
- the Campbell River area
- the Eldon Range
- lower Gordon River (catchment).

12. The World Heritage Planning Team within the Department of Lands, Parks and Wildlife will prepare a report on the appropriate boundaries of a Western Tasmania World Heritage Area (with the existing National Estate Area as a reference point) for presentation to the World Heritage Committee by 1989.

13. Any National Estate forests within the greater Western Tasmania National Estate Area that a Labor Government agrees to protect will also be nominated for World Heritage.

14. National Estate Forests

This agreement recognises the importance of protecting National Estate forests and the need for a Labor government to strive to achieve this objective. It will be the stated policy of a Labor Government to give full and on-going protection of National Estate values and, together with the assistance of the Federal Government, ensure that the interests of timber-industry workers are protected. The Independents will continue to work for the complete protection of Tasmania's National Estate Areas. To achieve the above objectives:

- a) Further logging and roading will not proceed in areas in which logging has not already been approved under the Federal-State forestry agreement in order to prevent exploitation of the forest resource pending the outcome of the review.

- b) Current or scheduled logging and roading operations in the following areas will not be allowed to proceed:

- i) East Picton;
- ii) Jackeys Marsh;
- iii) Lake Ina.

- c) A review process lasting at least a year will be established immediately upon a Labor Government assuming office to:

- i) investigate alternatives to logging in National Estate Areas and nominated areas (as at 31 May 1989) that are not already nominated for World Heritage or included within State Reserves
- ii) assess the economic and employment effects of protecting those National Estate Areas from logging operations and the strategies available to overcome these effects
- iii) ensure that the interests of timber-industry workers are protected.

- d) That review process will be carried out by a forestry task force whose composition, structure and precise terms of reference will be determined by the Premier, Mr Field, and Dr. Bob Brown.

- e) The resources, staff, data and facilities of the Forestry Commission will be at the disposal of the task force. The task force will also have access to data on forest resources in company concessions.

- f) Representations to the review will be sought from industry, timber-industry unions, logging contractors, independent experts, conservation groups and other relevant parties.

- g) The review will investigate but not be limited to:

- i) determination of the proportion of the State's total timber resource that lies within National Estate Areas not already nominated for World Heritage or included within State Reserves
- ii) installation of sawlog-recovery (flitch) mills at the State's chipmills and pulpmills
- iii) allocation of the \$41.5 million remaining from the 1988 forestry compensation package.

- iv) increased utilisation of the sawlog resource on private land
 - v) better utilisation of the sawlog resource at the State's sawmills
 - vi) intensive management of selected sites
 - vii) improving efficiency by changing the concession system
 - viii) establishment of sawlog plantations
 - ix) increasing financial incentives to logging contractors to recover good-quality sawlogs
 - x) better supervision of logging operations and segregation of sawlogs throughout the State, and particularly in the ANM concession
 - xi) technological developments in wood processing
 - xii) shedding of timber-industry jobs through automation and restructuring carried out by the timber industry itself
 - xiii) the extent to which logging of National Estate Areas can be delayed without loss of jobs in the forestry industry
 - xiv) the role and future of Tasmania's small sawmills in the forestry industry.
- h) The \$41.5 million remaining from last year's compensation package will be used to help implement alternatives to logging National Estate Areas and to ensure the protection of timber-industry workers' interests. The Independents will participate in the allocation of that \$41.5 million.
15. Any National Estate Areas which the review identifies as not essential to the logging industry will be protected as national parks.
16. There will be a full review of the Forestry Commission and a move to abolish the concession system.
17. Areas already agreed to be nominated for World Heritage as a result of last year's Tasmanian Forestry Agreement will be protected as

APPENDIX 1

Agenda for Reform

Labor's Agenda for Reform during its first term of office includes -

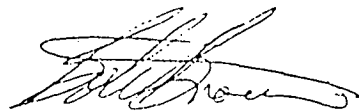
- a) fixed four-year parliamentary terms
- b) freedom of information legislation
- c) equal opportunities legislation
- d) price control legislation
- e) a feasibility study into the production of unbleached paper in Tasmania
- f) a government commitment to ensure that all new developments are environmentally safe
- g) commencement of a five-year program to clean-up Tasmania's waterways including an end to EPA exemptions and extra funding to local government
- h) new planning and environmental assessment legislation
- i) the injection of more funds into Tasmania's education system
- j) creation of the Douglas Apsley and Denison Spires National Park
- k) creation of marine parks
- l) a major export drive to push Tasmanian quality products onto world markets
- m) establishment of the Tasmanian Youth Foundation to create more training opportunities for young Tasmanians and a commitment to meeting the needs of Tasmania's homeless youth
- n) implementation of the Care and Respect program for aged people
- o) establishment of a ministerial portfolio for aboriginal affairs and a ministerial advisory council comprised of aboriginal people to advise the new minister. The granting of inalienable freehold title to those areas of land which are of particular significance to the aboriginal people

13.

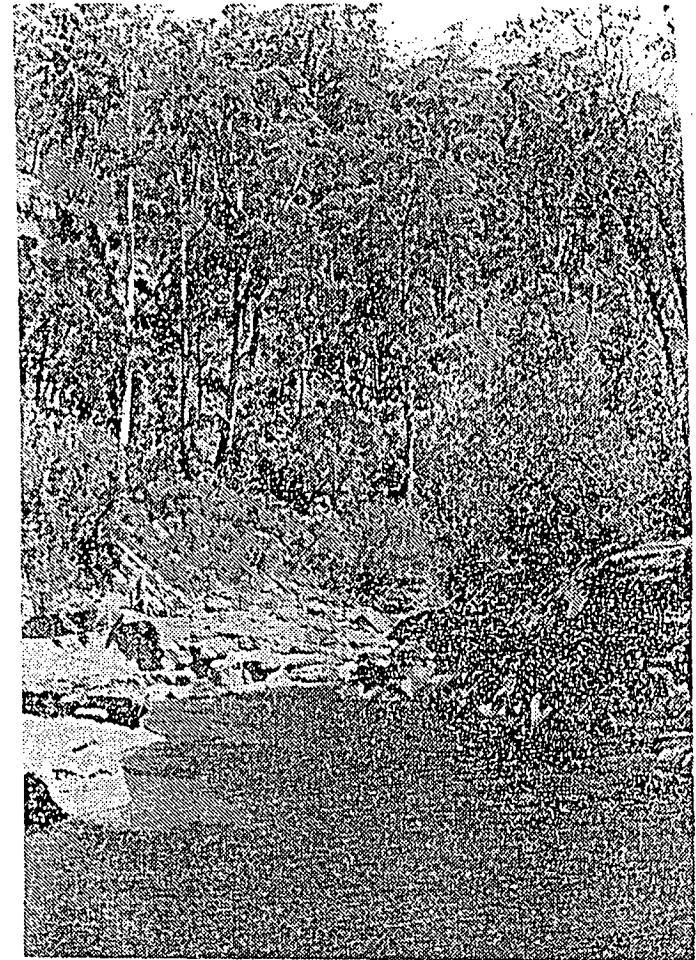
- p) the establishment of Wilderness and Wild and Scenic areas legislation
- q) establish consistent appeal provisions between Environment Protection Act, Mines Act, Sea Fisheries Act and local government
- r) reinstate land vested in HEC for lower Gordon dam as part of the Wild Rivers National Park and under the control of the Department of Lands, Parks and Wildlife
- s) public disclosure of bulk power contracts and royalty payments from mining companies
- t) public disclosure of the Nuclear Warships Safety Plan
- u) mining and mineral exploration will not be permitted in any national park or nature reserve. Any existing licences within World Heritage areas or National Parks will be revoked and the areas rehabilitated
- v) land degradation and deposit legislation
- w) decriminalise homosexual acts between consenting adults in private (with a free vote for ALP members).



Michael Field
(LEADER OF THE OPPOSITION)



Dr. Bob Brown
(MEMBER FOR DENISON)



Douglas Apsley...saved!

Without the Accord the Douglas Apsley and other areas would face a very uncertain future.

For more copies of this document
contact The Independents:-
PO Box 1365 GPO Hobart

ph (002) 21 1505

COMMENT AND ANALYSIS ON THE COMBINED ENVIRONMENT GROUPS STRATEGY

- After 12 months of consultation, a Forest and Forest Industry Strategy for Tasmania was agreed to by representatives of these bodies :
 - Forestry Commission
 - Minister for Forests office
 - Forest Industries Association of Tasmania
 - Country Sawmillers Association
 - Tasmanian Trades and Labour Council
 - Tasmanian Development Authority
 - Tasmanian Farmers and Graziers Association
 - Australian Timber Workers Union
 - Printing and Allied Industries Union
- The only participants in the consultative process unwilling to make any compromise were the Combined Environment Groups (CEG). In a last minute bid to justify their opposition to the majority view, the CEG devised a "strategy" of their own. It is a blueprint for the decline of Tasmania, a return to the position the environmentalists took up 12 months ago.
- This so-called strategy proposes ten steps, which together would represent a serious setback to employment and the Tasmanian economy. This is what it seeks:
 - to lock-up 42% of the State's area;
 - to reduce the sawmilling industry by 25%;
 - to eliminate cable logging;
 - to close immediately one of the State's two veneer mills;

to halve the supply of special timbers available for the craft and furniture industries;

to eliminate the possibility for any major development project;

to burn 2 – 2.5 million tons of pulpwood rather than export it;

to substitute softwood sawmilling for eucalypt sawmilling;

to eliminate fire as a forest management tool.

- Nowhere, in any part of the environmentalists strategy is there an economic impact statement – a costing of this attack on the jobs, security and well-being of Tasmanians. Nor is there any attempt to calculate the additional forest management costs it proposes, through the establishment of an Environmental Protection Agency.
- Nowhere, in any part of this strategy is there a social impact statement – an estimate of the cost of the family disruption, of interrupted schooling and of the human stress and distress caused by the loss of jobs that it proposes.
- Nowhere, in this environmentalist recipe for decline, is there an estimate of the future developments that will be blocked because of the uncertainty it engenders.
- This environmentalist strategy is grossly delinquent in its supporting argument. Nowhere is there any scientific justification for the proposal for the wholesale application of World Heritage and National Park status.
- The environmentalists make no attempt to explain how existing hardwood sawmills are to handle softwood sawlogs, as they propose. They appear not to know – nor care – that the equipment used is different. They make no effort to estimate the cost to sawmillers of the equipment changes – nor do they say

anything about the market for the softwood sawmilling they propose. They simply assume that markets will emerge.

In essence, this environmentalist strategy is inept in its argument, inadequate in its development and irresponsible in its objectives. The Government is right to reject it for what it is – a negotiating device to extend "consultations", despite the support of all other participants for the Forests and Forest Industry Strategy.

ATTENTION ANDREW REEVES
Department of Resources and Energy
Mines Division
Rosedale

FROM: COMBINED ENVIRONMENT GROUPS (Geoff Law).

5 July 1990.

AREAS BEING PROPOSED AS ADDITIONS TO NATIONAL PARKS OR NEW
NATIONAL PARKS IN THE FORESTS AND FOREST INDUSTRY STRATEGY.

Note that the purpose of the exercise of assessing
prospectivity is to help fulfil the provision of Clause 1 of
the Draft FFIS which says that "substantial" areas will be
set aside from wood production and, if not needed by the
mining industry, declared national park and nominated for
World Heritage.

Therefore areas put forward here are to meet the criterion
"substantial":

(Note that for the purposes of this document, "National
Estate" (Nat. Est.) = the Labor-Green Accord definition - ie
nominated by 31 May 1989.)

(Maps to be sent on Friday 5 July.)

1. Southern Forest National Estate Areas outside of World
Heritage Area (WHA):
 - South-East Cape
 - Catamaran River
 - Upper Esperance, Lune catchments
 - Pictou catchment
 - Euen catchment within Nat. Est.
 - Weld catchment within Nat. Est.
 - Denison and Russell catchments within Nat. Est.
 - Styx catchment within Nat. Est.
 - Florentine catchment within Nat. Est.
 - Wylds Craig environs within Nat. Est.
 - catchments of Beech Creek and Counsel River
 - Navarre Plains.
2. Proposed Great Western Tiers National Park.
3. Mersey catchment within Nat. Est. but outside of WHA.
4. National Estate Areas contiguous with but to the west
of WHA:
 - Reynolds Falls - Vale of Belvoir
 - Granite Tor
 - Ordell Range - Mt Murchison - Lake Beatrice

- Little Eldons - Governor River
- Teepookana State Forest and West Coast Range
- South of Macquarie Harbour

5. Meredith Range National Estate nomination
6. Norfolk Range - Mt Vero - Savage River National Estate area (using the outermost boundary)
7. Sumac Rivulet (RAP and Nat. Est.)
8. Wellington Range (proposed Protected Area plus Nat. Est. nomination).
9. North-East Highlands Nat. Est. Area (inc. Rattler Range and Mt Victoria).
10. Mt Field National Park extension area (map to be sent)
11. Tasman/Forestier Peninsulas proposed Abel Tasman National Park (map to be sent)
12. All areas covered by the Report by the Department of Parks Wildlife and Heritage on the optimum boundaries of a Western Tasmanian World Heritage Area (as per Clause 12 of the Labor-Green Accord)
13. Mount Dundas and Mt Reid RAPs (nos. 174 and 175)
14. Bernacchi Ridge RAP (no. 166)
15. Savage River RAP (no. 167)
16. Ramsey RAP (no. 169).

(AS AT JULY, 1990)



CURRENT NATIONAL PARKS
AND WORLD HERITAGE AREAS

14 000 km² - 22%

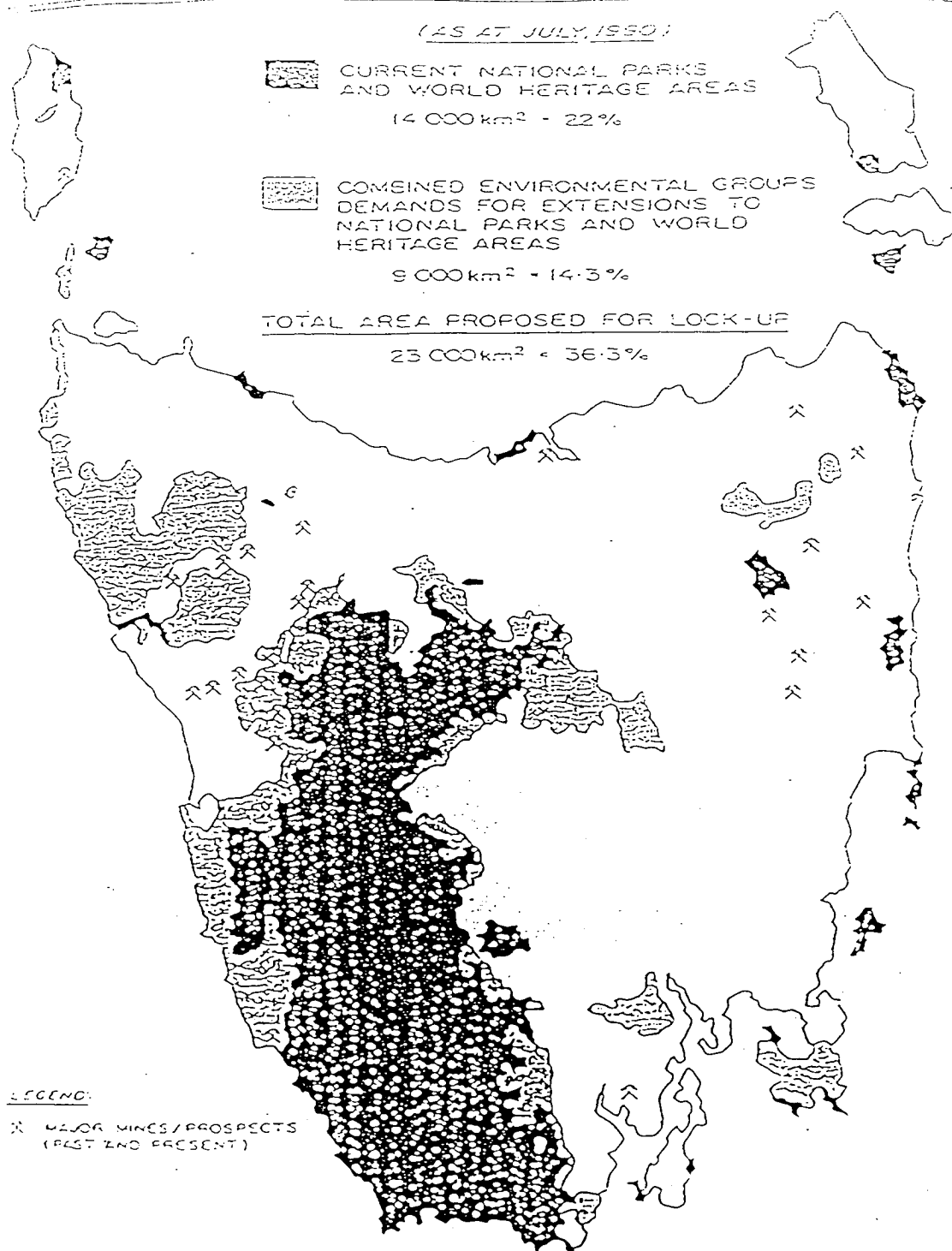


COMBINED ENVIRONMENTAL GROUPS
DEMANDS FOR EXTENSIONS TO
NATIONAL PARKS AND WORLD
HERITAGE AREAS

9 000 km² - 14.3%

TOTAL AREA PROPOSED FOR LOCK-UP

23 000 km² - 36.3%



LEGEND:

X MAJOR MINES/PROSPECTS
(PAST AND PRESENT)

LAND ANNEXATION
NATIONAL PARKS TO DATE
AND
CONSERVATION LOBBY DEMANDS

APPENDIX – CHAPTER 8

HEADS OF AGREEMENT

28 NOVEMBER 1988

These Heads of Agreement record understandings and undertakings reached between the Commonwealth and the State of Tasmania in relation to the resolution of the issues arising out of the Lemnathyme and Southern Forests Inquiry and other matters.

It is hereby agreed between the Commonwealth and the State of Tasmania that:

- 1) Apart from the Denison Spires, the area commonly known as the "Hole in the Doughnut", those areas specified by the Commonwealth Government's Decision of 4 August 1988 (see Attachment A) will be jointly nominated by the Commonwealth and the State for World Heritage listing. Questions relating to the management, funding and related matters are to be the subject of further discussion. The Commonwealth will provide funding support, the precise level being the subject of further discussion, in the normal context of the current management arrangements for the existing World Heritage Area.
- 2) The Hole in the Doughnut is to be the subject of State protection as a National Park under Tasmanian legislation.

- 3) The Commonwealth will provide the proposed Huon Forest Products Woodchip Mill with a woodchip export licence to permit Huon Forest Products to operate at a wood intake of not less than 350,000 tonnes per annum of roundwood and up to 400,000 tonnes per annum of roundwood as available on a sustained yield basis, plus such quantities as can be realised from other sources on a short term basis, such as fire damaged material, plantation establishment, sawmill residues, etc.

It is agreed that the allocation to Australian Paper Manufacturers will be at 185,000 tonnes per annum of roundwood and that the Tasmanian Pulp and Forest Products Triabunna Woodchip Mill will receive roundwood allocations at a level not less than 775,000 tonnes per annum.

- 4) The Commonwealth agrees to an increase in the sustainable yield of pulpwood from Tasmanian forests to the level assessed by the Tasmanian Forestry Commission, being 790,000 tonnes of roundwood per annum above the level agreed in the Memorandum of Understanding.
- 5) The Commonwealth and Tasmanian Governments share the objective of maintaining a viable veneer industry. To this end, both Governments agree to work jointly to develop access to alternative veneer resource (outside the agreed World Heritage boundaries), new products and new markets. The Commonwealth agrees to provide funds to enable this to occur.

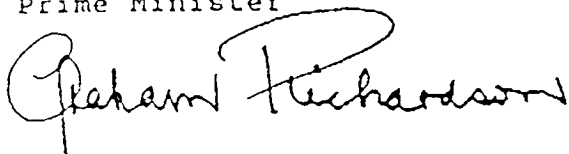
- 6) As a result of the reduced availability of sawlogs for the milling industry consequent upon listing of the area in paragraph 1, the Commonwealth will assist the State with the rationalisation and reconstruction of the forest industry. The Commonwealth will make available funding for this purpose from the agreed package as detailed in paragraph 8 below. The manner in which this assistance is to be applied will be the subject of further discussion between the two Governments.
- 7) To encourage the identification, segregation and recovery of veneer grade material, the Commonwealth will make available a bounty of \$10 per cubic metre for veneer logs produced and delivered to Tasmanian veneer mills. This figure is subject to variation after an assessment of its effectiveness.
- 8) The Commonwealth will make available, in a manner to be agreed between the two Governments, over a five year period beginning on 1 January 1989, a package totalling \$50 million, including:
 - up to \$30 million to be paid to the State in five equal instalments and to be expended by the State for plantations and for other suitable developments agreed by the Commonwealth and the State consistent with the forestry development elements of the Cook/Groom package (a copy of which is at Attachment B).
 - \$5 million for timber industry training, development, marketing and design, including specialised training in furniture and craft design and manufacture.

- . an untied grant of \$8 million, payable before 30 June 1989, to offset sunk costs of forest roading and management planning incurred by the Tasmanian Forestry Commission.
 - . the balance to be provided for the purposes outlined in paragraphs 5, 6 and 7 above and for other agreed purposes.
- 9) The Commonwealth and State endorse the elements of the Cook/Groom package at Attachment B.
 - 10) The Commonwealth agrees that the elements of the package detailed above will be quarantined for the purposes of assessing Tasmania's entitlements to all other forms of Commonwealth financial assistance, including without limitation Financial Assistance Grants, the Loan Council Program, Global Borrowing Authority and any specific purpose payments.
 - 11) The Prime Minister has invited the State to submit a list of proposals identifying activities with substantial ongoing Commonwealth employment which the State considers to be capable of being moved to Tasmania. The Prime Minister undertakes, if such proposals are practicable, to take up the matter positively with Ministers, Departments and Agencies.
 - 12) The Commonwealth undertakes not to initiate any further inquiries into forestry in Tasmania or to propose any other areas of Tasmania for World Heritage listing without the concurrence of the Tasmanian Government.

- 13) The Commonwealth agrees that logging can continue in National Estate areas subject to the consultative arrangements at present in place or those agreed between the Commonwealth and the State from time to time such as the proposed Tasmanian Forests Agreement.



(R.J.L. Hawke)
Prime Minister



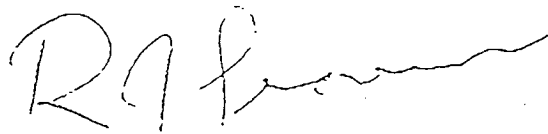
(Graham Richardson)
Minister for the Arts, Sport,
the Environment, Tourism
and Territories



(Peter Cook)
Minister for Resources



(Robin Gray)
Premier of Tasmania



(R.J. Groom)
Minister for Forests

COMMONWEALTH-STATE FOREST INDUSTRY PACKAGE

1. The Commonwealth undertakes not to initiate any further inquiries into forestry in Tasmania or to propose any other areas of Tasmania for World Heritage listing without the concurrence of the Tasmanian Government.
2. The Commonwealth agrees that logging can continue in National Estate areas subject to the consultative arrangements at present in place or those agreed between the Commonwealth and the State from time to time such as the proposed Tasmanian Forests Agreement.
3. The Commonwealth and the State agree to replace their current Memorandum of Understanding on woodchip exports with an expanded Tasmanian Forests Agreement (TFA). The Commonwealth and State Governments agree that the TFA is the appropriate mechanism for resolving issues related to logging in sensitive national estate areas. That Agreement will include clauses setting out the consultative mechanisms to be used in determining whether, how, in what volume and at what time such areas are to be logged. The TFA will be no more restrictive than the present MOU. The Agreement will also, inter alia, contain clauses governing:
 - procedures for sustained yield calculations
 - environmental standards for logging operations
 - regular reviews of the Forest Practices Code, with the first review set down for the final quarter of 1988
 - restriction of cable logging to those areas where its use is environmentally appropriate
 - further research studies
4. The Commonwealth proposes that the State Government be fully involved in determinations on the volume and number of export woodchip licences, and proposes a joint authority arrangement comparable with that used in the petroleum field.
5. Any claims for compensation arising from Commonwealth action to protect certain areas of State forest is a separate issue and is not covered by this document.
6. The State Government will extend the current moratorium on logging in rainforest areas for a further two years from 1st July 1988 pending the outcome of further studies and consultations with the Commonwealth Government.

7. The Commonwealth will join the State in an accelerated program for the establishment of tree plantations, to be used for commercial purposes and for afforestation of areas suffering problems with soil or water degradation. Specifically the Commonwealth agrees to provide up to \$30 million over 5 years for this purpose.
8. The Commonwealth and the State will jointly establish an expanded training package for workers in the timber industry. That package will focus on training in forest operations, furniture design and manufacture, and in financial management and marketing. The Commonwealth agrees to provide \$5 million over 3 years towards this program.
9. The Commonwealth and the State will commence a joint program to determine the prospects for value-added processing in the Tasmanian forest industries. That program will concentrate, in the first instance, on the prospects for establishing new flitch mills for recovery of sawlog material and on prospects for improved recovery of small wood. These studies will involve joint funding of \$50,000 per annum for 3 years.
10. The Commonwealth agrees to the granting of a woodchip export licence to Huon Forest Products according to terms and conditions agreed with the State Government.
11. The Commonwealth and the State agree to the shared use of the Buckland Training Area with logging possible in all but the areas being used directly by the Army.
12. To encourage the identification, segregation and recovery of veneer grade material, the Commonwealth will make available a bounty of \$10 per cubic metre for veneer logs produced and delivered to Tasmanian veneer mills. This figure is subject to variation after an assessment of its effectiveness.
13. The Commonwealth and the State will jointly review the rules regulating harvesting of trees on private property with the intention of encouraging use of trees as a crop, and consolidating and expanding existing afforestation programs.
14. To ensure that there is no waste of available sawlogs, the State will enter into an arrangement with industry and unions to station inspectors at the operating chip mills. The function of the inspectors will be to determine that classifications of logs have been done accurately in order to maximise the recovery of sawlog material.
15. The Commonwealth accepts the State's invitation to nominate a person to be a member of the State Working Party to be established to examine criticisms of the timber industry made in the Helsham Report.

16. The Commonwealth agrees that the operation of Senders' quarry within the Exit Cave area nominated for World Heritage listing can continue provided that acceptable limits are set to the scale and development of the operation. Should any financial loss result from any limits placed on the operation, the Commonwealth will pay compensation direct to the company concerned.
17. The Commonwealth agrees with the issue and maintenance of mining and exploration titles in the area nominated for World Heritage listing. Any mining development in the area nominated for World Heritage listing from an existing or future lease holder would be subject to a judgement from the State and the Commonwealth that the planned operation was compatible with the World Heritage values of the area. Should the Commonwealth in the future refuse any mining proposal in an area nominated for World Heritage listing, compensation will be considered for any financial loss resulting to the State Government and Tasmanian businesses.
18. The Commonwealth will raise no objection to State plans for a geological survey of the areas nominated for World Heritage listing. Within the normal resources and work program of the Bureau of Mineral Resources, the Commonwealth indicates its willingness to assist with that survey.



(Ray Groom)
MINISTER FOR FORESTS
GOVERNMENT OF TASMANIA



(Peter Cook)
MINISTER FOR RESOURCES
COMMONWEALTH GOVERNMENT

24th November 1989

LIBERAL GOVERNMENT

media release

TONY RUNDLE
MINISTER FOR MINES
SEPTEMBER 4, 1992.

The Mining Act has been breached and Benders Quarry has been left unsafe because of the unilateral decision of the Federal Government to shut down the viable limestone operation at Lune River.

The Minister for Mines, Mr Tony Rundle, said the State and Federal Governments had been negotiating how to make the quarry site safe at the time the Commonwealth broke off talks and shut the quarry down.

Mr Rundle said the Federal Government had a moral obligation to ensure the site was made safe. In its current state there was a risk that people could be seriously injured or killed.

"The quarry lease requires that the operator ensures the site is made safe after the operation ends.

"But because the Federal Government has acted in the way it has, the lease is now invalid and the Department cannot require the operator to safeguard the site as he is precluded from all activity by Mrs Ros Kelly's order," Mr Rundle said.

He said while Mrs Kelly claimed her action was to save the environment it in fact prevented the quarry operator from conducting a rehabilitation program.

Mr Rundle said the action taken by Mrs Kelly had clearly shown the Commonwealth was only concerned about winning green votes in Sydney and Melbourne.

49
"Mrs Kelly has deliberately misrepresented the State Government's position on Benders Quarry in an attempt to justify her decision to shut down the business," he said.

Mr Rundle said the State Government had spent a considerable amount of money proving the Maydena site.

"Mrs Kelly's claim that the State Government believes the proposed Maydena site is not a viable alternative is blatantly untrue.

"Throughout the negotiations with the Commonwealth on Benders the State Government maintained that the Maydena site was a viable alternative.

"However, we warned the Commonwealth that the hardline conservation movement would object to the relocation," Mr Rundle said.

He said conservationists would put every hurdle possible in the way to stop the relocation and the objections would delay the approval process by up to 12 months.

Pasminco EZ needs 25,000 tonnes a year of high grade limestone. The limestone is currently being supplied by a Mole Creek contractor, but there is a risk Pasminco will put the contract out to tender.

"If this happens an interstate company could win the contract and jobs would be lost in Tasmania," Mr Rundle said.

NB: Tony Rundle is available for media interviews in his Devonport Office on 004 24 5688 until 5.15 pm or after 6.30 on 004 27 9434

ends

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LIBERAL GOVERNMENT

media release

TONY RUNDLE
MINISTER FOR MINES
SEPTEMBER 7, 1992.

The Minister for Mines, Mr Tony Rundle, today called on the Federal Government to make clear what it proposes to do to allow the rehabilitation and stabilising of Benders Quarry.

Mr Rundle said he had written today to the Federal Environment Minister, Mrs Ros Kelly.

"Because of the unilateral action taken by the Commonwealth to close down the Lune River limestone quarry the quarry has been left unsafe.

"The Federal Government's action means the Mining Act has been breached.

"The quarry lease requires the operator to ensure that the quarry is left safe when the operation ends.

"However, in this case the Commonwealth's action has made the lease invalid and the Department of Mines can't require the operator to safeguard the quarry.

"Mr Bender is prevented from all activity at the quarry because of Mrs Kelly's action.

It is ironic that Mrs Kelly claims she closed the quarry to protect the environment, when in fact her action has prevented Mr Bender from conducting a rehabilitation program at the quarry," Mr Rundle said.

during negotiations between the Commonwealth and State the Tasmanian Government submitted a rehabilitation plan for the quarry which was prepared by the Federal Government's consultant, Professor Ollier.

However, the Commonwealth rejected the plan and walked out of the negotiations.

The plan detailed the phased closure of the quarry and its rehabilitation.

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Minister for The Arts, Sport, The Environment and Territories

ROS KELLY

MEDIA RELEASE

20 August, 1992

KELLY CLOSES BENDERS QUARRY

Ros Kelly, Minister for the Arts, Sport, the Environment and Territories has ended the long running threat to the Exit Caves system in Tasmanian Wilderness World Heritage Area by stopping blasting and quarrying at Bender's Quarry.

"Regulations under the World Heritage Properties Conservation Act 1988 were proclaimed and published in the Commonwealth Gazette this morning to prevent the use of explosives and to end further quarrying at Bender's Quarry, Ida Bay in Tasmania's South West," Mrs Kelly said.

"Reports available to the Commonwealth and Tasmanian Governments clearly demonstrate that past and present quarrying operations have damaged the caves and other features which are now known to be part of the Exit Cave system - the largest cave system in Australia, and universally regarded as of world heritage quality"

"To allow further damage, or the potential for further damage by more blasting would be contrary to Australia's obligations under the World Heritage Convention."

"I am not prepared to allow this to happen."

"The Commonwealth will ensure that the five workers at the quarry receive full redundancy entitlements and a fair ex gratia payment. We will explore ways in which former employees at Benders Quarry can be employed in rehabilitating the quarry."

"I would have preferred to relocate the quarry, and the Commonwealth made a very fair offer for relocation. However, the Tasmanian Government, which agrees that the quarry should be closed, has not seriously looked at alternative sites and rejected our offer out of hand. Their attitude left me no alternative other than to close the quarry."

Further information: Garrie Hutchinson 06 2777640

ROS KELLY

MEDIA RELEASE

KELLY REAFFIRMS DECISION

The Federal Minister for the Arts, Sport, the Environment and Territories, Ros Kelly, today reaffirmed that the Federal Government's decision to close Bender's Quarry reflected the Government's commitment to the maintenance of World Heritage values.

Mrs Kelly said that all the major reports on the Ida Bay quarry had concluded that quarrying would continue to have an impact on the World Heritage values of the Exit Cave system.

"In good faith we attempted to relocate to an alternative site but were told by the State government that it may not be feasible and that Mr Bender was preparing the quarry for further blasting."

"Under these circumstances I had no choice but to act and protect the Exit Cave system."

Contrary to the claims by Mr Bender and others, Mrs Kelly said the Federal Government had been very mindful of the needs of those quarry employees made redundant by the closure decision. Negotiations directed at settling a severance and dislocation package on behalf of those employees had already commenced and would be concluded rapidly.

The Federal Government also had indicated a willingness to negotiate with Mr Bender a payment in respect of the closure of the quarry. In making this offer the Commonwealth, while not accepting legal liability in this matter, had been mindful of the Cook-Groom agreement of 1988.

Mrs Kelly said she had written to Mr Bender ruling out any further blasting and advising that a kerst expert would be required to examine any proposal to remove loose stone.

"I am keen to work with the State Government on getting a rehabilitation plan for the quarry under way as soon as possible."

"The Federal Government has made its decision. It is in everyone's interest to get on with restoring the area."

Further information: Garrie Hutchinson 06 27776490 3 September 1992



MINISTER FOR THE ARTS, SPORT, THE ENVIRONMENT
AND TERRITORIES

Hon. Ros Kelly M.P.

Phone: (06) 277 7640
Facsimile: (06) 273 4130

The Hon Ralph Willis MP
Minister for Finance
Parliament House
CANBERRA ACT 2601

Dear Minister

I am writing to seek additional funding for the Commonwealth's contribution to the cost of relocating the Ida Bay Quarry to a location outside the Tasmanian World Heritage Area (TWHa).

Cabinet Minute 272 (amended) of 31 March 1992, noted Cabinet's agreement that Commonwealth support for the relocation of the quarry would be subject to advice from the Attorney General concerning Commonwealth liability for compensation.

In May 1992, the TWHa Ministerial Council discussed the implications of closure, particularly any Commonwealth obligation to pay compensation to Mr Bender in the context of the 1988 Commonwealth - State Forest Industry Package (Attachment A), paragraph 16 of which states:

The Commonwealth agrees that the operation of Bender's Quarry within the Exit Cave area nominated for World Heritage listing can continue provided that acceptable limits are set to the scale and development of the operation. Should any financial loss result from any limits placed on the operation, the Commonwealth will pay compensation direct to the company concerned.

I have been advised by the Attorney General that, whilst there may be no legal imperative on the part of the Commonwealth to pay compensation to Benders Pty Ltd, the Forest Industry Package may place a political obligation upon the Commonwealth to do so. The Attorney General further advised that payment of compensation to Benders Pty Ltd is appropriate (Copy of advice at Attachment B).

At the Ministerial Council Meeting, the Tasmanian Premier, the Hon Ray Groom MHA, requested the Commonwealth to meet its obligations under the Package and compensate Benders Pty Ltd with additional funds. The Tasmanian Government is opposed to funds provided for management of the TWHa being used to relocate the quarry and provide for any related employee redundancy costs. It was agreed at the Ministerial Council Meeting that State and Commonwealth officials would review details of all component parts of the relocation costs and report to their responsible Ministers. This has been undertaken (see Attachment C) and, consistent with the Ministerial Council decision and the Attorney General's advice, I now seek \$476 000 for relocation costs for Benders Pty Ltd, including \$425 000 for the quarry relocation and \$51 600 for employee relocation costs.

The Tasmanian Government is also seeking additional Commonwealth funds to reimburse expenditure on a freight subsidy (to equalise costs to Huon Valley farmers), rehabilitation works and an environmental assessment for the new Maydena site. I believe these are outside any political obligation to Bender's Pty Ltd arising from the Forest Industry Package.

in Life

The latter two elements should properly come from existing TWA management funds whilst the freight subsidy is not a cost to Bender arising from relocation of the quarry. Any unforeseen additional costs falling reasonably within the boundaries of the agreed definition of relocation costs should be paid from TWA funds. This will avoid any further calls for additional Commonwealth funding and will assist the Tasmanian Government to ensure that total claims are kept below the cap set by the proposed payment to Benders Pty Ltd.

I would welcome your urgent advice on this request as the Ministerial Council meets again on 28 June 1992 to finalise arrangements for relocation of the quarry.

I have copied this letter to the Prime Minister for his information.

Yours sincerely

ROS KELLY

June 1992

EXPLANATORY MEMORANDUM

Minute No 8 of 1992 - Minister of State for the Arts and Territories

subject - World Heritage Properties Conservation Act 1983

Proclamation under subsection 6 (3)

Subsection 6 (3) of the World Heritage Properties Conservation Act 1983 (the Act) provides that where the Governor-General is satisfied that any property in respect of which a Proclamation may be made is being or is likely to be damaged or destroyed, he may, by Proclamation, declare that property to be a property to which section 9 applies.

Subsection 9 (1) of the Act provides that where an act is prescribed for the purposes of that subsection in relation to particular property to which the section applies, it is unlawful, except with the consent in writing of the Minister, for a person to do that act, or to do that act by a servant or agent, in relation to that property.

In October 1989 the Commonwealth Government, under Article 11 of the Convention for the Protection of the World Cultural and Natural Heritage (the Convention), submitted the Tasmanian Wilderness to the World Heritage Committee as suitable for inclusion in the World Heritage List. The Tasmanian Wilderness (The Property) was inscribed on the World Heritage List on 13 December 1989.

A mining lease exists over 437 hectares of land in the vicinity of Lune River, in the Land District of Kent for the purpose of extracting limestone. The lease is identified as 69M/81 and was issued on 7 June 1984 under the State of Tasmania Mining Act 1972. The leased area is almost entirely within the Property and adjoins the Exit Cave State Reserve.

The Property includes limestone karst systems of major international significance containing superb examples of a variety of cave forms and including the massive underground passages of Exit Cave, a part of the Ida Bay karst system. There is a high density of caves in the vicinity of the quarry with known and likely connections to the Exit Cave system. Quarrying operations have been shown to impact directly and indirectly upon the Exit Cave system. Continuation of present quarrying operations is likely to impact adversely upon the World Heritage values of the Exit Cave system and the natural values of the Ida Bay karst system.

In recent discussions between the Commonwealth and State Ministers it has become clear that quarrying is likely to continue and that the Tasmanian Government does not propose to intervene.

The proposed Proclamation declares so much of Mining Lease 69M/81 in the vicinity of Lune River, in the Land District of Kent, Tasmania as is within the Property to be a property to which section 9 of the Act applies.

Consequently Regulations will be made under subsections 9 (1) and 21 (1) of the Act to protect Exit Cave from damage from quarrying operations in the leased area.

The Minute recommends that the Proclamation be made in the form proposed.

Authority: Subsection 6 (3)
of the
World Heritage
Properties
Conservation Act
1983